IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner Detroit Edison Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 10, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 560 F.2d 722, and appears in the Appendix hereto at pp. 1a-12a. The Court's denial on November 22, 1977, of the petitioner's motion for rehearing appears in the Appendix hereto at p. 13a. The decision and order of

the National Labor Relations Board, enforced by the Court of Appeals, is reported at 218 NLRB No. 147 (1975), and appears in the Appendix hereto at pp. 14a-17a. The decision of the Administrative Law Judge in this case appears in the Appendix hereto at pp. 18a-59a. The original opinion and award of the arbitrator in the related arbitration proceeding dated December 3, 1973, appears in the Appendix hereto at pp. 60a-76a, and the supplemental opinion and award of the arbitrator in that proceeding dated October 22, 1974, appear in the Appendix hereto at pp. 77a-87a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 10, 1977. A timely petition for rehearing en banc was denied on November 22, 1977, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(a)(5) of the National Labor Relations Act requires employers to furnish unions representing their employees with copies of tests and test results used by employers in the selection of candidates for jobs requiring the aptitude to learn specific skills in circumstances where the employer gave or offered to give the Union sufficient information to determine the validity of the tests, and the arbitrator involved in the grievance giving rise to this case, in construing the applicable collective bargaining agreement, found that production of the actual test battery was irrelevant to the arbitration proceeding and award.

2. Whether the judicial interpretation of Section 8(a)(5) of the National Labor Relations Act requiring employers to furnish unions representing their employees with tests and test scores conflicts with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(h)) and the guidelines of the Equal Employment Opportunity Commission on testing (29 C.F.R. Part 1607), which require, *inter alia,* that such tests and test scores not be divulged to unauthorized persons.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> "Section 158(a) It shall be an unfair labor practice for an employer—
>
> * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

United States Code, Title 42:

> "Section 2000e-2(h) . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action on the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The EEOC Guidelines on Employee Testing are found at 29 C.F.R. Part 1607, and are reproduced in the Appendix at pp. 88a-100a.

STATEMENT OF THE CASE

This case involves an order of the Board, enforced by the Court of Appeals, requiring the Company to disclose to a Union, representing certain of its employees, tests used by the Company as a selection device for candidates to a critically important job known as the Instrument Man job in the Company's power plants, as well as copies of all test scores linked with the name of the person taking the test, and all test papers of those taking the test. The importance of the Instrument Man job lies in the fact that he is directly involved in the maintenance of power plant instrumentation, which is vital to the safe operation of the Company's various power plants in the State of Michigan (App., p. 20a).

The tests are not a measure of already acquired job knowledge, but rather measure aptitude to learn and perform the specific skills of the Instrument Man job.[1] The record disclosed that the tests have been found to be statistically and practically valid in two different validation studies (i.e., there is a high correlation between one's performance on the test battery and one's performance on the job, as measured by 23 objective tasks on the job—tasks which are representative of the content and complexity of the job). One of these studies was performed in 1969-1970 by the Company's own professional psychologist staff and a later one was performed in 1972 by an outside professional consulting firm known as the National Compliance Company.

[1] The tests involved were the Minnesota Paper Form Board Test, which has been in use for several years to predict the ability to visualize in three dimensional space, and the Engineering and Physical Science Aptitude Test, which is divided into six parts, measuring an applicant's aptitude for mathematics, formulation, physical science comprehension, arithmetic reasoning, verbal comprehension and mechanical comprehension.

The case arose in the context of a Union grievance and subsequent arbitration proceeding in which the Union challenged the Company's selection of certain employees to the Instrument Man job. The grievants were denied the job because they had failed to make an acceptable score on the test. In the course of the arbitration proceeding and subsequent NLRB case the Union demanded copies of the test battery administered, the test scores and test sheets of all the applicants for the job. The Company responded by furnishing the Union with sample questions, a written explanation of the tests, the written validation studies of the tests, and each applicant's raw score without linking the applicant's name to the score. The Company also offered to furnish the Union with the test score of any applicant who was willing to have his score divulged and to turn over the test battery to a qualified professional psychologist of the Union's choice.

In the arbitration case the arbitrator found that the Union's position in that case was not damaged in any way by its lack of access to the test battery (App., p. 72a). He also found that the test battery was a "reliable valid test . . ." (App., p. 72a). On the merits he upheld the Company's right under the collective bargaining agreement to require an acceptable score on the tests, but required the Company to re-examine the qualifications of certain applicants whose scores on the test fell slightly short of the minimum acceptable score. In a supplemental award the arbitrator

found that the Company's re-examination, pursuant to his earlier award, had been properly carried out (App., p. 87a).

The Union, however, continued to demand copies of the actual test battery used, the test scores linked with the names of the applicants and the test sheets of all applicants, and initiated the unfair labor practice charge with the NLRB that gave rise to this case.

The Administrative Law Judge ordered that the battery of tests not be disclosed to the Union directly, but rather to a qualified psychologist of the Union's choice who would be free to consult with the Union and show the Union the tests to the extent necessary to process a Union grievance over promotion to the Instrument Man classification, but not to permit the Union to copy the test or otherwise disclose the test to those who may have taken the test in the past or might take it in the future. Inasmuch as the Company at the outset of the unfair labor practice hearing had offered to show the battery of tests to a qualified psychologist of the Union's choice, the Company did not except to that portion of the decision of the Administrative Law Judge, but did except to his proposed order that the raw test scores and actual test papers of applicants be turned over directly to the Union. The Union excepted to the requirement that the test battery be disclosed to a qualified psychologist of the Union's choice rather than to the Union directly.

The Board in a two to one decision upheld the Union exception and ordered that all the test materials involved be disclosed to the Union directly. The Board concluded that:

> "While we are making the tests available directly to the Union, we shall, in order to preserve their future utility, impose the same restrictions upon their use by the Union as recommended by the Administrative Law Judge." (App. p. 16a)

Former Member Kennedy would have affirmed the decision of the Administrative Law Judge in its entirety, noting that:

> "There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how the Board can enforce its exhortation not to copy or disclose the tests." (App., p. 17a).

The majority decision of the panel of the Court of Appeals enforced the Board's order in all respects.

In answer to the Company's concern about dissemination of the tests by turning them over to the Union directly, the majority merely referred to the provision in the Board decision quoted above purporting to impose a restriction on the dissemination of the test materials. In answer to the Company's concern that turning raw test scores, linked with the names of the persons taking the tests, and actual test papers of the applicants directly to the Union would involve a breach of a pledge given to each of the persons taking the tests that the results of the test would not be disseminated, and subject such persons to needless embarassment, humiliation and harassment, the majority of the Court simply cited its decision in *General Electric Co.* v. *NLRB,* 466 F.2d 1177 (6th Cir. 1972), holding that wage information received by the Company from other companies on a confidential basis and used as a part of a wage survey to determine rates of

pay for employees of the Company must be disclosed to the Union.

Finally, in answer to the concern of both the Company and the American Psychological Association (herein referred to as APA) as *amicus curiae* that disclosure directly to the Union of the test materials would involve the Company psychologists in a violation of their professional ethical code, the majority of the Court simply found that "the principles which underlie the National Labor Relations Act are paramount in this case" (App., p. 8a).

Circuit Judge Weick filed a dissenting opinion in which he concluded that the Board had not followed the standard used in *Kroger Co.* v. *NLRB,* 399 F.2d 455 (6th Cir. 1968), of recognizing and adequately protecting each of the conflicting interests involved. He found that the Board order recognized only the interest of the Union and that its order "constituted a gross abuse of discretion" (App., p. 12a).

Judge Weick pointed out the several Company efforts to accommodate the Union's interest in the Company's testing program and concluded that such information was "sufficient to permit the union to process adequately the grievance before the Arbitrator, or to perform its duties under the collective bargaining agreement" (App., p. 11a). To the majority opinion's claim that dissemination of the testing materials was adequately protected by the Board's Order, Judge Weick found such reasoning to be "really naive" and quoted, with approval, former Member Kennedy's analysis in support of this conclusion (App., p. 11a).

In addition, Judge Weick found that disclosure of the testing materials would involve the Company psychologists in a violation of the Code of Ethics of the APA, which has been recognized by the statutes of the State of Michigan, and that disclosure of the test scores and test papers linked to the name of the person taking the test constituted an invasion of a confidential and privileged relationship between the psychologists and the examinees.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises Significant and Recurring Problems Concerning the Ability of Employers to Continue to Use Testing as an Employee Selection Device

Testing is a major employee selection technique in both American industry and in government itself. A September, 1976, survey by the Personnel Policies Forum of the Bureau of National Affairs found from surveying 196 companies representative in size, geographical location, and nature of operation of American business generally, that 42% of such companies use job related tests in selecting employees for non-management jobs. PPF Survey No. 114, p. 1 (BNA, Sept. 1976). A December, 1977, survey by the U.S. Civil Service Commission found that that Commission alone uses 63 different tests in selecting federal employees, with 515 alternate forms of such tests, and that in fiscal 1977 alone, 891,635 persons were administered such tests, of whom 84,473 persons were selected for positions. Status of Test Usage in FY 77, Technical Note 77-2, Test Services Section, Personnel Research and Development Center, United States Civil

Service Commission (Dec. 1977). The decision below, if not reviewed and reversed by this Court, will pose significant, if not insuperable, barriers to the continuation of these extensive testing programs.

The primary barrier posed is that a requirement to turn over the test battery to unions representing employees will naturally lead to foreknowledge of the actual test items by all or a part of the employees who are to take the tests in the future. This foreknowledge, in turn, invalidates the results of the test from both a practical and a legal point of view.

As a practical matter, it is evident that such foreknowledge will result in a situation where the high scorers on the test will reflect not the aptitude of the taker of the test to perform the job, but rather the extent of his familiarity with the items on the test and his ability to memorize the "right" answers.

As a legal matter, such foreknowledge invalidates the test battery under civil rights laws, particularly Title VII of the Civil Rights Act. Section 703(h) of that Act permits employers to give and act upon the results of professionally developed ability tests, provided that the test or its administration is not designed, intended or used to discriminate. Under the mandate of Section 703(h), the EEOC has developed "Guidelines on Employee Selection Procedures", which begin with the proposition that:

> "properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies. . . ." 29 C.F.R. § 1607.1 (App., p. 89a).

Under the heading of "Minimum Standards for Validation" of tests, the Guidelines state that evidence in support of a test's validity must be based "on studies employing generally accepted procedures for determining criterion related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by the American Psychological Association . . ." 29 C.F.R. § 1607.5 (App., pp. 92a-93a).

Standard I5 of the APA Standards referred to in the EEOC Guidelines cited above states the following:

> "I5. The test user shares with the test developer or distributor a responsibility for maintaining test security.
>
> Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures could destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test." Standards for Educational & Psychological Tests, published by the American Psychological Association (1974), p. 67.

It is undisputed on this record that the test battery in issue is not a test for achieved skill, but rather an aptitude test where "prior knowledge of test items could destroy validity." (Ibid).

Standard J2 of the same APA Standards cited in the EEOC Guidelines states the following:

> "J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.
>
> Comment: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject or to hire or to reject, or to certify or not to certify, must have the interpretation. One useful (and unanswered) question is whether such a person who lacks the training necessary for the interpretation of scores should be given that training or should be given only the interpretations of scores." Id. at p. 68.

By turning over the test scores to unions and thereby to the employees represented by the unions, access to the test scores is thereby given to "curious peers".

This Court on at least two recent occasions has held that the EEOC Guidelines on Employee Testing are entitled to "great deference" and to be regarded as "expressing the will of Congress." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-31 (1975). See also *Washington* v. *Davis*, 96 S.Ct. 2040, 2053 n.16 (1976). In the *Albermarle* case the Court expressly noted with approval that the EEOC Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association", 422 U.S. at 431.

From the foregoing, therefore, it is evident that disclosure of the actual test and the actual test scores of individuals taking the tests to unions and employees represented by unions, who have no professional obligation not to publicize the tests and test scores, will invalidate the tests both as a practical matter and under Title VII of the Civil Rights Act. Invalidation of testing as an employee selection device, both in private industry and government, may well lead to unqualified persons being placed on jobs of critical importance, such as the job in question in the present case, to the detriment of the employees, employer and the public at large. The Company involved in this case is a large public utility—a classic example of a "business affected with a public interest" (*Munn* v. *Illinois*, 94 U.S. 113 (1877)). As such it has a duty to its consumers and the public to take all reasonable precautions to determine that only qualified personnel perform important jobs. Validated, job related testing is a business necessity essential to carry out that duty.[2]

The above described impact on testing as an employee selection device distinguishes this case from this Court's decision in *NLRB* v. *Acme Industrial Company*, 385 U.S. 432 (1967), holding that Section

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[2] Another practical barrier to the continuation of validated employee testing posed by the decision below is that disclosure of the test battery and test scores to the Union by the Company's professional psychologists places such psychologists in a clear violation of the APA Code of Ethics. As dissenting Judge Weick succinctly stated:

> "The disclosure of the test papers as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the State of Michigan" (App., p. 9a).

8(a)(5) requires a Company to furnish a Union with information probably relevant and of use to the Union in carrying out its statutory duties and responsibilities. Even conceding, *arguendo*,[3] the proposition that the test battery and test scores were within what this Court referred to in *Acme* as a "discovery-type standard" of materials ordinarily to be furnished to a Union in the processing of a grievance, the destructive impact of production of the test battery and test scores on testing and the selection of qualified personnel to perform important jobs in a safe and competent manner makes this case a distinctly different one from *Acme*.

The only response of the Board and Court below to the Company's stated concern that disclosure of the tests and test scores to unauthorized persons will invalidate the tests was the invention by the Board, and its approval by the Court below, of a "restriction" on the Union's use of the tests and test scores. Dissenting Judge Weick charitably characterized this "restriction" as "really naive". Among the reasons it is naive are the following:

1. A violation of the copying and dissemination provisions in the Board opinion (no protective provision appears in the Board's Order) would be most

[3] It must be noted, however, in this case that the Company gave the Union a wealth of information about the test battery; that the uncontradicted testimony of expert witnesses was that in view of the information furnished by the Company the production of the test battery itself was unnecessary; and that the arbitrator himself ruled, in light of the extensive materials about the tests that the Company did furnish, the production of the actual test battery was irrelevant to the Union's processing of the grievance in arbitration (App., p. 72a).

difficult, if not impossible, for a company to enforce and police once it has given a union the test materials required by the Board order. At that point it has lost control over the materials, and "test security" in accordance with standard I5 of the APA Standards quoted above and the EEOC Guidelines incorporating those standards have been breached.

2. As organizations properly responsive to their members' desires, unions are in a uniquely poor position to prevent intentional or inadvertent dissemination[4] of test materials, particularly in view of the ubiquitous copying machine. In addition, the employee leadership of the union to whom the materials are to be given changes on a regular basis, thereby permitting those employees who had seen the materials, and any other employees to whom they had shown the materials, to have an unfair advantage when and if they take the test in the future.

3. Even if the union were found to violate the protective provisions contained in the Board's Opinion, the Company remedy is speculative at best. It is difficult to conceive of a contempt proceeding being brought in the Court of Appeals against a union that has not been found guilty of an unfair labor practice.

4. Even if the union were liable in contempt for a violation of the protective provision, there is no ade-

[4] Inadvertent disclosure by non-psychologists can be illustrated by the case of *Davis* v. *Washington*, 348 F.Supp. 15 (D.C. 1972), where Judge Gesell entered an order sealing the Civil Service examination in question "because it is given on a regular basis to many federal job applicants", only to have the dissenting judge on the Court of Appeals append the entire examination to his opinion. See *Davis* v. *Washington*, 512 F.2d 956, 967 (D.C.Cir. 1975), reversed, *Washington* v. *Davis*, 96 S.Ct. 2040 (1976).

quate remedy for the violation, since the tests will have been hopelessly invalidated and it would take years to validate a new test.[8] The only sanction against the union would be punitive, not remedial—a very small source of comfort to a company whose testing program had been gutted.

For the above stated reasons, the "restriction" placed by the Board and Court below on the use of the tests by the Union does not make the case any less important or the problems posed by it any less recurrent.

The construction of Section 8(a)(5) of the National Labor Relations Act utilized to achieve this result is unprecedented in the forty-two year history of the Board. Never before has the Act been construed to require employers to turn over to unions aptitude tests and test scores achieved by named applicants. Indeed, in the only other reported case on the subject the Board's General Counsel refused to issue a complaint on the ground that the items on the test had a "unique character" and that:

> "[W]hile it [the Company] would bargain concerning the general subject of the tests, it would not furnish specific test questions, since advance inspection thereof would permit their content to be widely disseminated and thus impair the usefulness of the test." *International Telephone & Telegraph, Federal Division,* 22-CA-499, 46 LRRM 1387 (1960).

The present record is replete with evidence of Company bargaining on the subject of the test battery and

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[8] The evidence in this case showed that it took seven years to validate the power plant operator test battery.

the production to the Union of information concerning the test battery. It is also replete with uncontradicted testimony from expert witnesses from both within and outside the Company that, in view of the information funished by the Company, the Union did not need the test battery itself to evaluate the fairness of the test, and the arbitrator in the arbitration proceeding underlying his case so found. The only information withheld, in fact, was information whose production would invalidate the test battery. As found by dissenting Judge Weick, the Board decision and its affirmation by the Court below took into account only the Union's interest, completely ignoring the Company's interest in its testing program, and constituted a gross abuse of discretion.

The administrative and judicial creation of such an absolute, or, in the Court's language, "paramount" requirement forty-two years after the passage of the Act and in the above stated circumstances alone raises a significant and recurring question of statutory interpretation which should be resolved by this Court. When it is considered in addition that the creation of such a requirement leads inevitably to the invalidation of testing programs across a broad spectrum of American industry and government which utilize such programs, the need for review becomes compelling.

II

The Decision Below Raises A Conflict Between the Sixth and Second Circuits

In *Kirkland* v. *Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), a class of minority applicants for promotion to a position within the

New York State Department of Correctional Services, filed a civil rights complaint under 42 U.S.C. 1981 and 1983 challenging, *inter alia,* a State Civil Service examination which the State used to determine the successful applicants for the job. The Second Circuit agreed with the District Court that the examination was not job related and had a discriminatory impact on minorities, but reversed the District Court's order requiring that any new test for the position in question be furnished by the State to the minority applicants for their prior review. The Court held:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiffs' expert, his order should so provide; and proper steps should be taken to insure confidentiality." 520 F.2d at 427.

The *Kirkland* case and the relationship of civil rights legislation concerning testing to the Board's order under Section 8(a)(5) of the National Labor Relations Act were extensively briefed to the Sixth Circuit by the petitioner. That Court, however, chose to ignore that relationship and thus created a conflict over the propriety of giving applicants for positions opportunity for advance review of tests to be taken in the future for entry to these jobs.

This, of course, is not the classic conflict in the sense that two circuit courts of appeal have construed the

same federal law in different ways. In a way, it is a more pervasive conflict since it reflects a judicially created conflict in the inter-relationship of the National Labor Relations Act and civil rights legislation (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981). This petitioner and the multitude of other companies and governmental bodies which use job related tests stand in the middle of this conflict. Because of the importance of testing in obtaining qualified candidates for important jobs and because of the widespread use of testing, this Court should resolve this conflict.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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APPENDIX

APPENDIX

No. 75-2192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE DETROIT EDISON COMPANY, *Respondent*.

ON APPLICATION for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed August 10, 1977.

Before: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. WEICK, Circuit Judge, (pp. 9-12) filed a separate dissenting opinion.

LIVELY, Circuit Judge. The question in this case is whether the National Labor Relations Board abused its discretion in directing The Detroit Edison Company to deliver to a union which represented certain of its employers the psychological aptitude tests used in determining eligibility for promotion together with the answer sheets and scores of employees who took the tests. After conducting a hearing on an unfair labor practices charge filed by the union the administrative law judge found that the information sought by the union was relevant and would be of use to the union in carrying out its statutory duty as the bargaining representative of the employees and that failure to furnish the requested information was a violation of Section 8(a)(5) of the National Labor Relations Act. The administrative law judge directed Detroit Edison to give to the union the

scores of the individual applicants. However, he directed that the tests and actual answer sheets of the applicants be delivered "only to a qualified psychologist selected by the Union to act in its behalf in this matter . . . ." He further ordered that

> the psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests.

Both parties filed exceptions to the decision and order of the administrative law judge, but Detroit Edison limited its exceptions to that portion of the decision and order which required it to turn over to the union actual test scores of identified individual employees. The company did not except to the finding that it had engaged in an unfair labor practice by refusing the union's request for the test materials, but requested the Board "to adopt that part of the order which requires the test be turned over to a qualified psychologist selected by the Union . . ."

The Board, in its decision and order which is reported at 218 NLRB No. 147, affirmed the rulings, findings and conclusions of the administrative law judge and adopted his recommended order with one modification. It ordered Detroit Edison to supply copies of the tests and answer sheets and scores directly to the union rather than to a qualified psychologist selected by the union, while adopting the restrictions placed on use of the materials by the administrative

law judge. The matter is before this court on an application for enforcement filed by the Board and a petition for review filed by Detroit Edison. We conclude that the order of the Board should be enforced.

The dispute in this case arose when Detroit Edison posted notices of six vacancies in the classification of "Instrument Man B" at its Monroe generating plant. Ten employees from the Monroe unit applied for promotion to the posted position, but all failed to achieve the "acceptable" score set by the company on a battery of psychological aptitude tests. The vacancies were filled by promoting employees with less seniority from other units of Detroit Edison who scored at or above the recommended level. The union filed a grievance under the terms of the collective bargaining agreement and requested the company to deliver to it the actual tests that were given and the answers sheets and scores of the employees who took the tests, asserting that these documents were needed in processing the grievance. Though the grievance proceeded to arbitration, the union filed an unfair labor practices charge for failure to furnish the requested information and it was stipulated that the arbitrator's decision would not be final until there had been a disposition of the unfair labor practices charge.

The collective bargaining agreement provided that promotions would be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different . . . ." The union conceded in the arbitration proceedings that the company had established the right to use standardized tests as a measure of an employee's qualifications, but contended that it could only police the contract by examining copies of the tests and actual test papers when an issue of fairness related to the testing procedure was raised. Detroit Edison contended that the tests were designed only to predict future success in a particular job and did not measure existing skills and knowledge; therefore, it argued, the sample

questions and descriptive literature of the tests together with validation studies were all that would be required to judge its fairness. The company also charged that disclosure of the actual test battery and answer sheets to the union would inevitably lead to dissemination of questions and answers. With respect to the answer sheets and test scores of individual employees, Detroit Edison claimed "confidentiality" as justification for not turning these documents over to the union. During the unfair labor practices proceeding the company offered to disclose the actual tests to a qualified industrial psychologist on behalf of the union, to let the union's lay representative take the test and to furnish the answer sheets and actual scores of individual employees if the employees consented.

It is the duty of an employer generally to provide to the authorized representative of its employees information which the representative needs to perform its duties. *N.L.R.B.* v. *Acme Industrial Company*, 385 U.S. 432, 435-36 (1967); *N.L.R.B.* v. *Truitt Manufacturing Comany*, 351 US. 149 (1956); *Kayser-Roth Hosiery Co., Inc.* v. *N.L.R.B.*, 447 F.2d 396 (6th Cir. 1971); *N.L.R.B.* v. *Rockwell-Standard Cor.*, 410 F.2d 953 (6th Cir. 1969). Referring to permissible Board action directing an employer to deliver such requested information to a union, the Court in *Acme Industrial Company, supra,* at 437, said: "It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Matters related to seniority and eligibility for promotion under a collective bargaining agreement satisfy the test of probability of relevance to the duties and responsibilities of the union representing employees under that agreement. Since Detroit Edison unilaterally selected the standardized tests to be included in the examination for Instrument Man B and unilaterally determined the cutoff point below which no applicant would be considered eligible for promotion to

that classification, the union was entitled to information about the tests.

Without actually contesting the finding that the tests, answer sheets and scores are relevant, Detroit Edison argues, in effect, that the circumstances of this case are such as to require that the tests and answer sheets be delivered only to a qualified psychologist. The Supreme Court held in *N.L.R.B.* v. *Truitt Manufacturing Company, supra,* 351 U.S. at 153-54, that "[t]he inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." Detroit Edison points to this court's decision in *Kroger Company* v. *N.L.R.B.*, 399 F.2d 455 (6th Cir. 1968), as supporting its position. There the court denied enforcement of a Board order which directed delivery to a union of an entire management program which covered many areas of managerial concern other than the specific matter which was in dispute at the time the request was made. The court noted that the union request for disclosure was cast in very broad terms and that there was no showing that the information requested was needed for any currently unresolved grievance. In *Kroger,* the court stated that ". . . it is perhaps significant in this case that the Union's showing of need for purposes of collective bargaining is more general and theoretical than immediate and practical." *Id.* at 457. These comments are not descriptive of the present case. The request from the union in this case was in very specific terms and arose out of an unresolved grievance. Considering "the circumstances of the particular case," *Truitt, supra,* the *Kroger* court concluded that the company did not commit an unfair labor practice in refusing to deliver the requested information.

We have also examined *Emeryville Research Center, Shell Development Company* v. *N.L.R.B.*, 441 F.2d 880 (9th Cir. 1971), and *Shell Oil Company* v. *N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972), but they too are distinguishable from

the present case. In *Emeryville* the court found that the union's demands were overbroad and its stated reasons for wanting the information were very general, and that the company was not afforded an opportunity to comply because of failure of the union to specify its needs. In *Shell Oil Company* v. *N.L.R.B., supra,* the court found that the employer had declined to turn over the names and addresses of all employees of a unit to the union because of a *bona fide* concern that nonunion employees would be harassed, as they had been during a recent strike. The court also found that the company made a reasonable offer of a substitute method by which the union could contact all employees but that the union adamantly refused to retreat from its original demands.

In the present case Detroit Edison argues that the "circumstances of the particular case" are that the actual battery of tests which it uses will be of no value to the union and that if the tests fall into unauthorized hands they will be of no future use to the company though a great deal of effort and expense has gone into their selction and validation. It is possible that the union will not be able to make any determinations about the fairness of the tests by itself and that it will need the advice of a psychologist. Nevertheless, that is a decision that the union should be allowed to make rather than a condition to its right to examine the tests. This may be a case where it would have been better if the union and Detroit Edison had been able to agree upon a neutral party to receive the documents, *see General Electric Company* v. *N.L.R.B.*, 466 F.2d 1177, 1185 (6th Cir. 1972); but in the absence of such an agreement the Board did not err in dispensing with the administrative law judge's recommendation that the documents be delivered only to an industrial psychologist. The answer to Detroit Edison's concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on

use of the materials by the union. The restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board. Because of its experience in such matters and its administrative competence the Board is vested with a broad discretion in fashioning remedies. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216 (1964). The corresponding scope of judicial review is narrow. *N.L.R.B.* v. *Local No. 106, Glass Bottle Blowers Association,* 520 F.2d 693, 697 (6th Cir. 1975). Applying these principles, we find no abuse of discretion in the remedy ordered by the Board in the present case.

Both the administrative law judge and the Board ordered the company to give to the union actual test scores linked to the names of the employees who took the tests. The company argues that it would be a breach of confidentiality to disclose the actual scores of employees who did not achieve the recommended grade and that it would "involve probable misuse of such scores, needless embarrassment, humiliation and harassment of those taking the tests." Detroit Edison asserts that it assured each employee who took the test that the scores would not be disclosed, and that management itself has not had access to the scores of identified employees. A similar promise that relevant economic data would not be disclosed to third parties was held in *General Electric Company* v. *N.L.R.B., supra,* not to present a valid defense when an employer was requested to disclose relevant information to the union. The requirement that the bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure. *Shell Oil Company* v. *N.L.R.B., supra,* 457 F.2d at 618-19; *United Aircraft Corporation* v. *N.L.R.B.,*

434 F2d 1198, 1207 (2d Cir. 1970), *cert. denied,* 401 U.S. 993 (1971).

The company also contends that disclosure of the actual test battery and of the linked test scores would involve its industrial psychologists in a breach of their professional ethical code. The American Psychological Association filed a brief as *amicus curiae* contending that the Board's order ignores the interests of psychologists, the tested employees and future examinees as well as users of the test battery, including Detroit Edison. The court has considered all of these interests and has concluded that the principles which underlie the National Labor Relations Act are paramount in this case. Detroit Edison cannot rely upon an asserted privilege which is personal to the employees who took the examination, and we are not informed of any rule of law under which the professional code of the American Psychological Association can stand as a barrier to the right of a duly chosen and certified collective bargaining representative to receive information of use to it in carrying out its duties and responsibilities. The Board showed its consideration for the expressed concerns of the company and the Psychological Association by adopting the limitations on use of the material recommended by the administrative law judge.

The application of the Board for enforcement is granted, and the petition for review is denied.

WEICK, Circuit Judge, dissenting. The Order of the Board, which the Court enforces, protects only the interest of the union, and does not recognize, or even consider, the conflicting interests of the employer, Detroit Edison. The Board's Order destroys the value for future use of psychological tests which Detroit Edison had validated at great expense, by requiring Detroit Edison to turn over to the union the battery of tests, including the test papers. These test papers were in the custody of qualified psychologists

employed by the company (employer), to which papers even company management had no access, and the disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. § 14.677(1)(b).

The Board's Order also required the company to turn over to the union the test scores of each employee who had taken the tests and link to his name his test score, notwithstanding the fact that psychologists had assured each examinee that such score would be kept confidential and would not be disclosed to anyone without his written consent thereto. None of the examinees had given such consent. A confidential and privileged relationship thus existed between the psychologists who gave the tests and the examinees.

The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan.

Detroit Edison did, however, furnish to the union a wealth of material, which included: The company's 1970 validation report of the tests; the 1972 National Compliance Company validation report; Explanations of the battery of tests given; Representative sample questions from the batteries; the test scores of all of the applicants, but without revealing which examinee received the score.

The company further offered to divulge to the union the name and test score of any examinee who consented thereto, but the union declined to request such consent from any of its members.

The company further offered to permit the union's representative, Mr. Clem Lewis, to take the tests.

The company further offered to turn over to a qualified psychologist selected and employed by the union, all of the withheld material which the union requested. This would have afforded at least some protection to the company, as the union's psychologist would have been bound by the same ethical code as that binding the company's psychologist, but the union even refused to accept this offer.

The Administrative Law Judge did enter a partial protective order which did protect the battery of tests but not the test papers or the names and scores of the examinees who took the tests. This order was as follows:

> [T]hat the purposes of the Act will best be effectuated if Respondent be directed to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf in this matter, such submission to be made within 10 days after Respondent receives notification of the individual selected. The psychologist shall be free to duly advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to Respondent. See *Fawcett Printing Corp.*, 201 NLRB 964. (A. 38)

The company filed exceptions only to that portion of the protective order which required the company to turn over to the union the raw test scores, identified by the name of the employee, and the test papers of the applicants.

The material which the company did furnish to the union was, in my judgment, sufficient to permit the union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement. The furnishing of all of the papers requested by the union would have required the assistance of a psychologist, but the union declined to accept such offer. These papers simply could not have been evaluated by a lay person.

This, in my judgment, implies that the union did not wish to be bound by any ethical considerations, but wanted to be free to use the test papers for any purpose it desired.

But even the partial protective order of the Administrative Law Judge, which order was little enough, did not satisfy the Board. The Board reversed the partial protective order and ordered that the company turn over all of the material requested, but imposed upon the union the same conditions as those which the Administrative Law Judge imposed on the psychologist. This was really naive. Member Kennedy dissented, stating:

> The majority's modifications of the remedy recommended by the Administrative Law Judge are not justified. There is no professional obligation on the part of the union not to publicize the tests or their results. I do not see how this Board can enforce its exhortation not to copy or to disclose the tests.

Detroit Edison was vitally concerned in securing qualified applicants for a critical position. Its testing program

has been nullified by the action of the Board. In a case where the union had requested information which was too broad and covered many facets of managerial concern, we stated in an opinion written for the Court, by Judge Edwards, in *Kroger Co.* v. *NLRB*, 399 F.2d 455, 457 (6th Cir. 1968):

> To us the critical problem appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here.

These interests include the company, the examinee, and the psychologists. In *Kroger* we set aside the Board's order and denied enforcement.

Since the Board did not follow the criteria of *Kroger*, but recognized and enforced only the interest of the labor union, its order constituted a gross abuse of discretion and it ought not to be enforced.

No. 75-2192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE DETRIOT EDISON COMPANY, *Respondent*.

Order

BEFORE: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

No judge of this court having favored ordering consideration en banc of the petition for rehearing filed herein by the respondent, the petition has been referred to the hearing panel.

Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied. Judge Weick dissents.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By GRACE KELLER
Grace Keller, Deputy Clerk

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 7—CA—10276(2)

THE DETROIT EDISON COMPANY

and

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO

Decision and Order

On January 29, 1975, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, the Respondent and the Union filed exceptions, supporting briefs, and answering briefs; and a brief *amicus curiae* was filed by Michigan Psychological Association.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs [1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as herein modified.

We agree with the Administrative Law Judge that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with copies of the battery of aptitude tests administered to the employee applicants for the position of Instrument Man B, including the actual test papers of the applicants and the actual test scores made by each employee. For purposes of remedying this violation, we

[1] The Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

agree with the Administrative Law Judge that the Respondent should be required to submit the test scores to the Union, but, contrary to the Administrative Law Judge, we believe that the test papers themselves should also be submitted directly to the Union, rather than "only to a qualified psychologist selected by the Union to act in its behalf in this matter" and, through him, to the Union.

The Administrative Law Judge has required the intervention of a psychologist to receive the test papers because he believes that the mere submission of the tests to lay union representatives is not likely to be productive of constructive results. It may well be that the Union will find it necessary to retain a psychologist to interpret the concept of Respondent's tests and assist it in fulfilling its responsibility to represent the employees. But it does not follow from the existence of this possibility that we should condition the Union's access to this information. As the bargaining agent of the employees involved, it is the Union which is entitled to information which is necessary to its role as bargaining agent in the administration of the collective-bargaining agreement. We have found that the information requested by the Union here may be of value to the Union in fulfilling its responsibility to the employees. We believe it is reasonable to assume that, having requested the papers, the Union intends effectively to utilize them. Consequently, we would not condition the Union's access to the information on the retention of a psychologist but rather would have Respondent submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required.

Like the Administrative Law Judge, we are concerned with protecting the tests from such disclosure as would destroy their future utilization. Although directing Respondent to supply copies of the tests and the actual test papers to a qualified psychologist, the Administrative Law Judge accorded to the Union the right to see, study, and

use them to the extent necessary to process and arbitrate the grievances for which they were requested, and then to return them to Respondent, "but not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests," as more fully explained by the Administrative Law Judge in the section of his decision entitled "The Remedy." While we are making the tests available directly to the Union, we shall, in order to preserve their future utility, impose the same restrictions upon their use by the Union as recommended by the Administrative Law Judge.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, The Detroit Edison Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

Substitute the following for paragraphs 2(a) and (b) and reletter the remaining paragraphs accordingly:

"(a) Submit to the Union copies of the battery of tests administered to employee applicants for the position of Instrument Man B at the Monroe Power Plant in November or December 1971, or January 1972, including the actual test papers of the applicants, and the actual test scores made by each applicant, in accordance with this Decision."

Dated, Washington, D.C., June 30, 1975.

Howard Jenkins, Jr., Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

MEMBER KENNEDY, concurring in part and dissenting in part:

I would affirm the Decision of the Administrative Law Judge in its entirety. The majority's modifications of the remedy recommended by the Administrative Law Judge are not justified. There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how this Board can enforce its exhortation not to copy or to disclose the tests. Accordingly, I would adopt the remedy recommended by the Administrative Law Judge.

Dated, Washington, D.C.

Ralph E. Kennedy, Member
NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 7-CA-10276(2)

THE DETROIT EDISON COMPANY, *Respondent*

and

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO, *Charging Party*

John A. Ciaramitaro, Esq., for the General Counsel.

Ralph H. Houghton, Jr., Esq., (*Fisher, Franklin & Ford*), Detroit, Mich., for the Respondent.

Mr. Clement J. Lewis, Washington, D.C., for the Charging Party.

Decision

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Detroit, Michigan, on September 23, 1974, upon a complaint issued on August 8, 1974, based upon a charge filed by the above-named Charging Party (herein "the Union") on April 4, 1973. The complaint alleges that, following the filing of a grievance concerning qualifications for and promotion to the position of Instrument Man B, the Union, on and after March 5, 1973, requested the above-named Respondent (herein "the Respondent") to furnish the Union with the aptitude tests administered to each of the employee applicants for promotion to the position of Instrument Man B, including those promoted and not promoted, the examination papers of those applicants, and their test scores, and that the Respondent, in violation of Sections 8(a)(1) and (5) of the Act, since on or about March 15, 1973, has refused to furnish the Union with the information described.

Respondent's answer to the complaint, as amended at the hearing, admits the factual allegations set forth above, with certain affirmative averments considered hereinafter, but denies commission of the alleged unfair labor practices. Respondent's answer admits allegations of the complaint sufficient to justify the assertion of jurisdiction under current standards of the Board (Respondent, a public utility located in Michigan, during a recent annual period, received supplies shipped in interstate commerce valued in excess of $5,000,000, and during the same period sold electrical energy to customers in the State of Michigan valued in excess of $250,000), and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case,[1] from observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following:

Findings and Conclusions[2]

A. SUMMARY OF THE FACTS AND ISSUES

Since about 1943, the Union has been certified as the bargaining representative of Respondent's employees in approximately 28 different appropriate units (Resp[illegible]'s exh. 25, pp. 2-5). Among these, the Union was cert[illegible] by the Board, on April 1, 1971, as the bargaining representative of operating and maintenance employees of Respond-

[1] The record includes transcripts of 5 days of hearing bef[illegible] an arbitrator. These have been given careful study.

[2] Respondent in its brief submitted proposed findings of fact and conclusions of law which have been fully considered. These are accepted only to the extent they are consistent with the findings and conclusions set forth hereinafter.

ent's production department at its Monroe Power Plant.[3] These employees, including the job classification of Instrument Man B at that plant, were covered by a collective-bargaining agreement between Respondent and the Union effective from June 16, 1969 through June 12, 1972, which has been succeeded by another agreement negotiated in 1972.

In late 1971, Respondent determined that six positions in the classification of Instrument Man B should be filled at its newly constructed Monroe Power Plant. The position, while at the lowest starting grade under the bargaining contract, and usually requiring training on the job, is considered a critical job by Respondent because it is involved with maintenance of plant instrumentation, vital to the operation of the plant, and is the natural path for advancement to higher Instrument Man classifications. Basically in accordance with provisions of the bargaining agreement, notice of the vacancy was posted (Respondent's variation from normal procedure is irrelevant to the issues herein), and first consideration was given to applicants from the Monroe Power Plant, as required by the contract.

The posted requirements for the Instrument Man B job were 1) satisfactory high school credits for 2 years of math and 1 year of science, 2) a satisfactory physical examination, 3) a minimum of "recommended" on the required Instrument Man aptitude tests selected by Respondent, and 4) a satisfactory attendance record. Ten Monroe Plant em-

[3] The complaint alleges, the answer admits, and I find that the following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: "All operating and maintenance employees of Respondent's Production Department at its Monroe Power Plant, but excluding supervising operators, student engineers, training personnel, professional employees, technical employees, office clerical and plant clerical employees, part-time employees, temporary employees, seasonal employees, guards, foremen, assistant foreman, and all other supervisors as defined in the Act, and all other employees."

ployees bid the job. All were rejected for failure to make the cut-off score of 10.3 on the aptitude tests.[4] Over 30 employees from other units covered by the contract who also bid the job were then considered. One, Elliott, who was an incumbent instrument man in another unit was selected without the necessity of taking the aptitude tests. Of the remaining applicants from the other units, the five most senior men who made a score of 10.3 or better on the tests were selected for the open positions.

On January 20, 1972, the Union filed a grievance asserting that the testing procedure used was unfair and that six senior men from the Monroe Power Plant should have been selected. Respondent rejected this grievance at all steps of the grievance procedure and eventually the grievance was taken to arbitration.

During the processing of the grievances, including the arbitration proceeding, the Union requested certain information (as considered more fully hereinafter), including the actual tests used in the examination of the applicants and the scores each of them made. These were refused by Respondent basically on grounds of confidentiality, as discussed in more detail later. The arbitrator held that he had no authority to order Respondent to give the Union the information sought. Respondent also asserts (and the Union denies) that the arbitrator also held that the information sought by the Union was irrelevant to the disposition of the grievance.

The arbitrator, as we shall see, directed that Respondent should give further consideration to three applicants who fell below the Respondent's 10.3 cut-off mark, and otherwise denied the Union's grievance. Thereafter, Respondent

[4] One of these, Wiley, had passed a prior aptitude test given by Respondent for the position which set lower standards than the present battery of tests. He was permitted to take the new battery, but failed to make the cut-off score.

asserts that it considered the three applicants as directed by the arbitrator, found that one had additional qualifications that overrode his failure to make the cut-off score, and selected him for the position of Instrument Man B at the Monroe Power Plant. The Union protested that all three should have been selected. This issue has been heard by the arbitrator, but no decision on the issue has been made.

As has been noted, the major issues involved here concern whether Respondent should give the Union the actual examination tests which were administered to the job applicants and the scores each of them made on the tests. Respondent asserts that it was justified in refusing to give the Union this information because it was not "relevant or necessary for the purpose of pursuing [the grievance] or for any other reason." (Ans. to complaint, par. 13) Respondent also contends that these matters are confidential and that disclosure of the actual tests would utterly destroy the future use of the tests and the efforts Respondent has made to make sure that the tests are valid for the purpose used.

B. The Tests

For some time Respondent has been engaged in the process of testing employees for promotion into certain trades classifications in an effort to determine in advance (that is, to predict) whether they have a potential to learn and perform well in the new classification. These tests are not designed to test the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently. These tests have been constructed or assembled by the Industrial Psychology Division of Respondent's Employment Department. Respondent has not extended this testing procedure to all the trades or classifications in which it might be used. However, in about 1958, because of

the significant importance of the Instrument Man classification, the Industrial Psychology Division, apparently using the validation procedures discussed below, assembled a battery of three tests to be given to applicants to that position in Respondent's operations. Nevertheless, prior to the latter part of 1969, supervisory personnel responsible for the Instrument Man functions complained that the battery of tests used did not provide competent men. In the latter part of 1969 and the first part of 1970, the Industrial Psychology group began a process of revalidating the tests being given for promotion into the Instrument Man classification. This process of validating such psychological tests, as described in the record, is as follows: In one stage of the process the psychologist, after carefully studying the job function involved in depth and in detail, with assistance from supervisors of that function, would select certain job tasks that were considered to be representative of the job as a whole in range and difficulty. In the case of the Instrument Man this consisted of 23 job tasks. (Resp. Exh. 13) Based upon these job tasks, supervisors of the instrument men were asked to mark the incumbent instrument men as to how each of them performed on the job. From these reports, the psychologist rated the incumbents on a numerical scale on the basis of their competency. At the same time, according to Dr. William L. Roskind, Respondent's Director of Industrial Psychology, the psychologist, as a result of his analysis of the job, "would have some hypothesis about which aspects of the job, which aptitudes can be measured, which aptitudes would, in fact, predict successful performance on the job," and he "would then go to the catalogues of tests by research and so on, and look for tests that would measure the aptitudes . . . that you hypothesize [are] relevant to that job."[5] This battery of tests selected by the psychologist would then be given to the incumbents who had already been rated by supervisors and the psy-

[5] In some instances it was indicated that the psychologist might construct his own test questions.

chologist on their performance on the job. As stated by Dr. Roskind, ". . . if we picked out six tests [that] we would hypothesize would, in fact, produce performance . . ., in running one of these validating studies . . ., we would determine which tests actually do predict performance. Which ones will, in fact, predict the high performance individuals and which the low [performers]. . . . Those tests on which the poor performers did poorly and the high performers did well would be the test that we would select for use in selecting [test] batteries for the future."

In summary, then, when the results of such a battery of tests administered to a representative group of employees already on the job compare favorably with the performance of the incumbents on the job as rated by their supervisors and the psychologist, the tests are considered valid (that is predictive of future performance on the job.)[6]

As a result of pursuing this process, about early 1970, Respondent's Industrial Psychology group decided that a battery of two standardized, widely-used tests were valid for the purpose of statistically predicting which employees would be likely to do well in the Instrument Man job.[7] A report of the methods that were followed to arrive at this decision was prepared (Resp. Exh. 13). In 1972, Respondent employed an independent testing firm which revalidated Respondent's study and issued a written report as to its findings. (Resp. Exh. 14)[8]

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[6] See also, Dunnette, *Personnel Selection and Placement* (Wadsworth Pub. Co. 1966). It is also to be noted that in scoring the results of the tests given, the psychologist apparently does not use raw scores, but weighs and correlates the scores among the various tests given.

[7] The two tests, each of which is apparently sold commercially by certain psychological organizations, are 1) The Minnesota Paper Form Board Test, and 2) the Engineering and Physical Sciences Aptitude Test (EPSAT). One test previously used as part of the battery, since 1958, was dropped.

[8] This revalidation appears to have been part of Respondent's

The answers to the tests are of a multiple choice variety, the applicant marking his choice on the test sheet himself. The scoring is done by means of a key superimposed on the test sheet. It appears that Respondent seeks to avoid any subjective influence in the actual scoring of the tests. It is admitted that human error does occur in the scoring of the tests, though Respondent seeks to correct this by rechecking.

The cut-off score. As previously noted, when the Instrument Man battery of tests was administered to the applicants for the position involved in this case, those who made a score of less than 10.3 were rejected by Respondent from further consideration. Exactly when this cut-off score was established and why this particular point was selected is less than clear from the material presented in this record. Since the original 10 applicants from the Monroe Plant were rejected for failure to meet that standard, it is assumed that the cut-off point was selected at the time the test battery was selected, though there is no specific reference to that in Respondent's exhibits 13 and 14. The discussion in the arbitrator's decision at pp. 16-17 (based upon material not in the present record) also indicates that the cut-off was based upon the performance of the incumbents in 1969-1970, used to validate Respondent's testing program. The arbitrator found, as considered hereinafter, that Respondent in selecting a point which tended to maximize the probability that the applicants selected would succeed, "did more than eliminate only those who had no chance of succeeding," it "increase[d] the number of people who

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efforts to prepare for litigation in which it has been involved under the Civil Rights Act of 1964. See *Stamps, et al.* v. *Detroit Edison, et al.*, 365 F. Supp. 87 (E.D. Mich., 1973). The Union was a defendant in that case. It would appear, however, that in making this revalidation, the employees were not retested, contrary to some indications in the record, for Dr. Roskind, Respondent's Director of Industrial Psychology, testified that the independent company did not actually utilize the tests being validated.

were rejected, some of whom would have succeeded." While the arbitrator found that the setting of the score at 10.3 was not "in itself arbitrary," he was convinced that "the manner in which the test score [was] applied does border upon arbitrary action."

It is noted that, in disposing of the issues in *Stamps* v. *Detroit Edison, supra,* involving other psychological test batteries used by Respondent in screening employees, the Court came to a similar conclusion, stating (365 F. Supp. at 118):

> None of the test batteries here in issue were demonstrated to be administered with cut-off scores which are reasonable in that they screen out only those applicants likely to possess insufficient ability to perform on the job. On the contrary . . . the cut-off scores were demonstrated to be so high as to reject applicants whose scores are equal to the scores of employees who have been sufficiently able to perform in the past. The continued use of these test batteries, even if demonstrated to be valid predictors of job success, without adjusting their cut-off scores to a more reasonable level is unlawful.

C. The Contract Provisions

Two sections of the applicable collective-bargaining agreement relate to the promotion of employees. In pertinent part, Art. VII, Sec. 13 provides: "In promotion of employees . . . to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employees being considered are not significantly different. 'Significant difference' shall be 'head and shoulders difference,' . . ." Art. VIII, Sec. 38(b), similarly provides, in pertinent part: "If such vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department. . . . If the reasonable qualifications and

abilities of the employees being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. 'Significant difference' shall be 'head and shoulders difference'. . . ." By "head and shoulders" difference, the parties seem to mean a substantial or obvious difference, more than a shade of difference, among the men considered.

D. The Grievance Process

In the grievance filed by the Union, filed January 20, 1972, it is asserted that "the testing procedure used was unfair in filling the six vacancies in the Instrument Shop. The bidder from Monroe Power Plant should have been selected."

In Respondent's written reply, dated January 21, 1972, Fred J. Locke, Technical Engineer, noted that "None of the Monroe Power Plant grievants who were by-passed . . . met the selection standards of the Instrument Repairman Aptitude Test. . . . Since they did not meet the required posted qualifications for this test, they were not selected."

The minutes of the First Step Meeting between Respondent and the Union on the grievance, dated February 22, 1972, prepared by Respondent as required by the agreement, show that the Union protested the fact that the test was adopted without consultation with the Union, which was characterized as an arbitrary action by Respondent, and requested that it be informed of the cut-off score on the new and the old tests, as well as the difference between the two tests. The Union was informed that the new tests were the same as the old except that one specific test had been dropped from the battery. According to the minutes, the Union was told that the cut-off score ("the point of acceptability") was "arrived at through the use of a formula, there is not a percentage score as such," and that

when the present battery of tests was decided upon, "the cut-off score was adjusted. This adjustment was validated through a sample of 33 employees presently performing the work as related to their test results."[9] It appears that the Union was not given the cut-off scores requested. At a later point, the minutes state that the Union protested that the new cut-off point was "not only unfair, but unknown." During the course of the discussion, the minutes state that "The Union asked if [Respondent] would furnish scores of the Monroe personnel. Management felt that furnishing the results would not accomplish anything."

By letter dated February 25, 1972, Respondent denied the grievance on the ground that the tests given were valid and Respondent was satisfied that the cut-off score was "justifiable."

The minutes of the step 2 meeting on this grievance, dated May 19, 1972, prepared by Respondent, reveal the parties taking substantially the same positions as in the first step meeting, including discussions on the merits of the grievance with which we are not concerned here. The last item noted: "8. The Union has asked for test scores, but they haven't named the grievants other than the senior men at the plant."

By letter dated May 24, 1942, Respondent again reviewed the facts, found no violation of the agreement, and denied the grievance.

The Union appealed this decision to the president of Respondent, and, on August 29, 1972, the president's delegate replied, by letter, in pertinent part, as follows:

> A second complaint of the Union is that the men at Monroe were disqualified because of tests and the Company did not demonstrate a "head and shoulders"

[9] "Presently" apparently refers to 1970, when the test was validated as Respondent asserts.

> difference between them and those who were selected. They also point out that changes in the test standards were not discussed with them, nor were they informed.
>
> A basic qualification is a standard that must be met before a comparative evaluation can be made on a "head and shoulders" basis. . . .
>
> In this instance, one basic qualification was that applicants have been found acceptable under a new test standard established in 1970 after the requirements for the position of Instrument Man had been restudied and reevaluated. It has been the custom to inform the Union test revalidation studies, but in this case the explanation and information to the Union were inadvertantly overlooked.
>
> • • •
>
> It is evident that the Union does not have a complete understanding of test validation, establishment of standards, development of test batteries, and similar information relating to the Company's testing program. To that end, I am directing that a meeting for Union Officers and Chairmen be arranged to enhance their understanding of the Company's objectives in the testing area. A mutually acceptable date will be worked out prior to November 1, 1972.
>
> The grievance is denied.

Although it appears that Respondent's position, as set forth in the above letter, is that the aptitude tests constitute an "entrance qualification" for the job (see Resp. Exh. 7, p. 22)—and not a method of making a "head and shoulders" comparison among the applicants required by the contract—Respondent's testimony at the arbitration hearing indicates the contrary. Thus Emil Ruch, Director of Union Relations, Lawrence E. Kanous, who was instrumental in setting up the Instrument Man aptitude test, and Dr. Roskind, all testified that passing the tests constituted

a "head and shoulders" difference, emphasizing the importance of the cut-off score. Kanous asserted, therefore, that an applicant who made one point over the cut-off score would be head and shoulders over an applicant who made one point under the cut-off. At another point, Kanous testified that the test should be only a part of the determination whether an applicant received the job, not the sole determinant. Notwithstanding the letter quoted above, the terms of the notice posting the job, counsel's statement to the arbitrator, and the general trend of the record, Dr. Roskind testified in the present hearing that the aptitude tests were to be considered as only one factor in the selection process.[10]

By letter dated October 27, 1972, the Union requested arbitration of the dispute between Respondent and the Union concerning this grievance.

E. Union Requests for Information

As previously noted, the complaint *alleges* and the answer *admits* that the Union requested the Respondent to furnish the Union with the aptitude tests administered to each of the employee applicants for the Instrument Man position, including those selected and not selected, the examination papers of those applicants, and their test scores. Respondent's brief seems to question the adequacy of the requests for the "examination papers," however. (Brief pp. 5, 18)

The record shows that the Union through Mr. Lewis, Union Director of Services, made its first written request for information in connection with the Instrument Man

[10] Compare Respondent Counsel's statement to the Union in his letter dated July 18, 1973: "I appreciate the fact that you are questioning whether or not there is a 'head and shoulders difference' between those who were selected for the job and those who were not. We, of course, look at the issue as being one of whether the applicants meet the minimum qualifications for the job."

grievance on March 5, 1973, in preparation for the arbitration hearing which the Union had requested. In that letter the Union requested "the following exhibits and material":

1. The actual battery of tests used in the captioned matter.
2. The method of scoring or grading and the actual criteria for finding 'acceptability' or 'recommended' or 'not recommended.'
3. A report on the test validation.
4. A report by the National Compliance Company, which, as I understand it, consulted upon, and reviewed the Company's whole testing system or apparatus.

In response, Respondent's counsel, by letter dated March 15, 1973, confirming an earlier telephone conversation, advised that Respondent would meet with Lewis on April 2, 1973, adding, however, "As I explained, the actual battery of tests used in the testing program are confidential and in order to insure the future integrity of those testing procedures, they cannot be released. Mr. Roskind had indicated, however, he would be pleased to discuss the testing procedures with you, as well as explaining the validation procedures, etc."

At the meeting on April 2, the Union was given a copy of Respondent's Report of the study made in 1970 on the Instrument Men tests (Resp. Exh. 13) and the report made by the National Compliance Company on these tests (Resp. Exh. 14). Respondent refused to give the Union the actual scores made by the applicants or the battery of tests used. No other information concerning this meeting appears.

By letter dated May 23, 1973, to Dallas Jones, the arbitrator designated to hear the grievance in this matter, the Union requested the arbitrator to have the Respondent

supply the Union with "copies of the actual tests used by 16 candidates who applied for the Instrument job," stating, in pertinent part:

> We have previously asked the Management of Detroit Edison Company to supply us with the actual tests which were the instruments to effectively foreclose grievants in the above matter from entering training, trial or promotion to Instrument Man classifications at the Monroe Plant of Detroit Edison. . . .
>
> . . . the Arbitrator has the right and duty . . . to order a party to produce certain records necessary to the case of the other side and relevant to the case at bar. . . .
>
> We regard the actual tests as essential, and, perhaps key, to our case. . . .
>
> • • •
>
> Much has been said about the secrecy and confidentiality of these tests. . . . What this advocate needs to know is if the questions on those tests are reasonably relevant to the Job being considered. This could be an important point in our defense.

As set forth hereinafter, the arbitrator denied the Union's request.

After the close of the initial arbitration hearing on this matter, the Union continued to seek such information. Respondent's letter dated July 10, 1973, refers to Union letters dated June 2 and June 26, and responds, in pertinent part, as follows:

> . . . We have made a diligent attempt to provide you with all the information you will need in order to have a competent psychologist properly analyze these tests and the testing procedure.

> As I advised you at the arbitration hearing, the actual test score of the employees have always been considered extremely confidential by the Company . . . none of the employees involved have given the Company any express permission to release this information. Therefore, as we previously indicated, we must respectfully decline your request for that information . . . during the hearing we did present . . . the range of actual scores attained by the grieving employees who are involved in this case.[11]
>
> With respect to your request for the actual tests themselves, again I would advise you that these have been considered confidential by the Company and we could not comply with your request without destroying the future validity of those tests. Furthermore, I am advised by Mr. Roskind and Mr. Kanous that such disclosure would be violative of Principle 13 of the Ethical Standards of Psychologists. From a practical standpoint, which I am sure you can understand, the Company has spent tens of thousands of dollars in validating these studies and tests which were utilized in this case. . . . Therefore, from all standpoints, it is necessary that we maintain the confidentiality of those tests. Furthermore, . . . a competent, trained psychologist can properly study and evaluate the tests and the validation procedures with the information you already have . . . and, furthermore, even if he [had the tests], they would be of no particular use in reaching a decision as to whether or not the tests were properly validated and utilized.

In this letter, Respondent did enclose material in response to the Union's request for information pertaining

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[11] At the arbitration hearing, Respondent gave the scores made by certain participants in the test, but refused to state which applicants made which score.

to the battery weights and method of scoring both the Minnesota Paper Form Board Test and the EPSAT test.

On August 6, 1973, in recognition of the Union's concern over its position if the Board ordered disclosure of the information sought contrary to a different opinion of the arbitrator, the parties entered into a stipulation, later acknowledged by the arbitrator, that "if the Company ever in fact is ordered to disclose the tests and does in fact disclose the actual tests as a result of a final court order, then [Respondent] would be agreeable to having the arbitrator listen to any additional argument or evidence based upon the disclosure of the tests which might affect his decision with respect to the substantive issue in the grievance. In view of the fact that ultimate disclosure through a court test would take several months or possibly years, . . . [We] feel . . . you ought to decide the issues and then let the chips fall where they may with respect to the National Labor Relations case."

F. Arbitration

The initial hearings in the arbitration case were held on May 23, 24, 30, and 31, 1973. According to the arbitrator's decision, however, the hearing was not declared closed until September 18, 1973. (Resp. Exh. 12, p. 9.) During the intervening period as noted above, the Union continued to request information concerning the tests and scores, and the parties agreed that the arbitrator should proceed to decision notwithstanding the pendency of the instant matter. On July 23, 1973, the Arbitrator ruled that he did not have the power to require that the requested information be furnished to the Union. On December 3, 1973, the arbitrator issued his decision, stating, in pertinent part (exh. 12, pp. 9-12, 13, 14, 15, 16-17, 17-18, 18-19):

> . . . the Company's position is that it has the right to establish minimum, reasonable qualifications for a job, including the attainment of an acceptable score on a

> reliable and valid test, and that Article VII, Section 13 does not come into play until these qualifications are met. The Union's position is that the contractual mandate requires an examination of all relevant information to determine if an employee is "head and shoulders" above another employee and that an employee cannot be disqualified on the basis of one item.
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> • • •
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> . . . one of the basic issues involved in the dispute [is] does the Company have the right to establish minimum, reasonable qualifications for a job? The Arbitrator believes that the Company does have that right. While Article VII, Section 13 gives weight to seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different," it does not, on its face, preclude the establishment of reasonable qualifications to perform the job before the measurement of qualifications and abilities begins. . . . The testimony adduced at the hearing indicates that the Company has resisted every attempt by the Union to restrict that right.
>
> This holding does not mean, however, that the Company can by-pass employees in a unit who meet the minimum qualifications in the hope of obtaining better qualified employees in other units. It is only when none of the bidders meet the reasonable established qualifications for the job, that the Company can move to the next step of the procedure.
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> • • •
>
> There is no doubt that the Company has established and maintained the right to use tests as a measure of an employee's qualifications—the Union concedes this point. The Union has, however, raised several questions not only in regard to the use of the test, but in regard to the test itself.
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> • • •

A great deal of the testimony and evidence was concerned with the test battery itself. The Union questioned the validity of the test by reference to the type of questions asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning of the face validity of the test.[12]

Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance. There would be justification in the Union's request if the test were measuring job knowledge.

In support of its argument for disclosure of the test, the Union cited Central Soya Company, 41 LA 1031. Frankly, the Arbitrator believes this decision was in error if in fact the tests used were standardized aptitude tests of the type here in question. The Arbitrator believes a better precedent is Wisconsin Electric Power, 36 LA 46901. In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test.

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There is no doubt that as tests go, this particular test has a high degree of validity. The way in which it was developed and is used also overcomes many of the objections raised by arbitrators and industrial relations practitioners; that is, the test was developed especially

[12] Both before the arbitrator and at the hearing in this matter, Respondent's witnesses asserted that a layman could not tell whether the questions on the tests were job related, and therefore the questions had no "face validity." Those witnesses also asserted that qualified industrial psychologists do not need to see the test questions either in order to determine whether the test is "valid," but that this can be done by study of statistics and published reports about the tests.

for this job (job related), and it has been properly validated.[13] In addition, and very important, the instant test is not used to compare one employee against another in terms of the score attained.

• • •

Nevertheless, tests are not perfect predictors of success —and the Company does not claim otherwise—even when they have high validity as here; they simply increase the probability of successful performance if a certain score is attained. But even when that score is attained there will be people who will not succeed, and there will be people who would have succeeded even though their scores were below the cut-off point. This point is illustrated by the scatter diagram contained in the Company Exhibit No. 1.

This diagram makes clear that individuals who score less than 9.2 (or 9.3) have virtually no chance of succeeding. It is also clear that by establishing the cut-off score of 10.3 the accuracy of the prediction is increased —13 of the 16 above average performers scored 10.3 or better while 13, and perhaps 14, of the 17 below average performers scored less than 10.3. But it also increases the number of people who are rejected, some of whom would have succeeded. Thus, between 9.3 and 10.3 there were three who were rated above average and six who were not.

If the cut-off score had been set from 9.0 to 9.3, the Arbitrator would have no difficulty in saying that if an individual did not attain that score he should re-

[13] However, it is noted that the battery of tests involved here were standardized tests. There is no proof in the record that they were developed to test the Instrument Man job. The tests were selected by the Respondent's Industrial Psychology group because in their personal judgment it was thought that these tests would predict which employees would do well on the job.

ceive no further consideration; one could then compare the cut-off score, as the Company has done, to having one hand or two, being color blind or not, etc. But that is not the case here. By setting the cut-off score at 10.3, the score which produces the best results in terms of predictability, it does more than eliminate only those who have no chance of succeeding.

The Arbitrator does not believe that the setting of the cut-off score at 10.3 was in itself arbitrary; this has been done for good reason as noted. But the Arbitrator is convinced that the manner in which the test score is applied does border on arbitrary action. There is no doubt—although there were some late protestations to the contrary—that those individuals who did not attain an "acceptable" score were removed from any further consideration. This seemingly differs from testimony by the Company's psychologists concerning the proper use of tests. . . .

. . . Based upon the evidence, it is clear that an individual who scores 10.3 is far more likely to succeed than one who does not. It clearly indicates a significant difference between two such employees *unless* there is something in the individual's background which would offset this lower score. In fairness to the senior employee, there should be such an investigation; otherwise seniority is undermined.

. . . Certainly, such experience, work or educational, cannot offset scores of below 9.3. In fairness to those grievants who scored between 9.3 and 10.3, however, it seems to the Arbitrator that the parties should review their qualifications to see if they do have qualifications that were not fully considered and that would offset their failure to attain a 10.3 score.

• • •

Award

. . . Company did not violate the agreement by establishing . . . an "acceptable" score on the Instrument Man test battery as a general qualification for selection into the Instrument Man B classification. The attainment of such a score creates a presumption of "significant difference" over the failure to attain such a score, unless offset by relevant educational or job experience. The Company is obligated to consider such evidence and cannot disqualify an employee without such consideration. Certain of the grievants, as indicated hereinbefore shall have their qualifications reviewed to determine if such qualifications offset their failure to attain an "acceptable" score. In the event it is found that any or all of these grievants have the qualifications necessary to offset the "not recommended" score they received on the aptitude test, they shall be promoted into the Instrument Man B classification.

Respondent thereafter determined that three applicants for the position had received scores on the tests between 9.3 and 10.3, and reconsidered them on the basis of their education and work experience. Respondent decided that one of these men had a background that offset his failure to attain the 10.3 cut-off score and promoted him to the Instrument Man B position. On July 18, 1974, the arbitrator heard the Union's protest that all three men should have been promoted. No decision has been rendered upon this rehearing. During the course of this reopened hearing, the arbitrator stated that in his opinion the Union was entitled to receive the specific scores attained by the applicants on the tests in order that the Union be able to "police the contract." This information has not been given the Union.

G. Respondent's Positions

As has previously been noted, Respondent contends that the tests given for the Instrument Man B position and the specific scores made by named applicants should not be given to the Union for the following reasons: It is asserted that 1) the validity of the tests cannot be determined from observation of the questions in the tests, but only by study of the research manuals prepared by publishers of the tests, and the statistical and other data prepared by those who administered the tests in situations which, it is claimed, validate the tests (as described hereinabove in section B), and, therefore, the Union does not need the tests; 2) the test questions are confidential, and if revealed to persons other than qualified psychologists would lose their value, for the tests depend, in part, "on the naivete" of those who take the tests;[14] 3) the scores of the individual applicants are also confidential, Respondent assertedly having advised the applicants that they would not be disclosed. Respondent also asserted some concern that those employees making low scores would be embarrassed and possibly harassed by other employees; and 4) it would violate certain principles of the code of ethics of the American Psychological Association to reveal the contents of the tests or the scores. In pertinent part, these principles state: "Psychological tests and other assessment devices, the value of which depends in part on the naivete of the subject, are not reproduced or described in popular publications in a way that might invalidate the techniques. Access to such devices is limited to persons with professional interests who will safeguard their use." "Test scores, like test materials, are released only to persons who are qualified to interpret and use them properly."

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[14] As previously noted, in a communication from Respondent to the Union, it was stated that the Respondent had spent "tens of thousands of dollars in validating these studies and tests. . . ."

Respondent presented two witnesses, Dr. Roskind of its own staff, and Dr. Marvin D. Dunnette, professor of psychology at the University of Minnesota, in support of the positions noted above. In general these witnesses, or one of them, supported, or tended to support, the positions set forth above. There are certain significant qualifications which should be noted, however:

(1) With respect to the term "validity," the testimony of the witnesses soon made clear that they were using the term to describe tests that would fulfill employer's purpose —to maximize the probability that those who passed the tests would do well on the job. When it was suggested to Dr. Dunnette that the studies and statistics that would satisfy him that the tests were valid for the employer's purpose might not suffice to inform employees with respect to how they were to qualify for promotion—an important part of their working conditions—Dr. Dunnette stated that he had not given any thought to that problem, but agreed that he did not believe in "secrecy as a policy" in dealing with employees concerning their working conditions.[15] Dr. Dunnette finally concluded that the major, or the basic reason for not giving copies of the tests to the Union was that if the tests were given "to potential examinees, the tests would quickly become worthless," "the security of the test demands it not be part of the public domain."[16]

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[15] It is noted that when Dr. Dunnette was asked if copies of the tests would assist *the Union* in determining whether the test were valid, he replied that "I would not regard the test as helpful *to me* in making that judgment." I believe that the transposition of terms was careful and deliberate.

[16] It is noted that Dr. Roskind, who made the decision not to give the test copies to the Union, testified that he made the decision only on the basis that submitting the tests to the Union would 1) destroy "test security" in that the tests would become known to applicants, and 2) violate professional ethical standards. This conforms to Dr. Dunnette's final position.

A similar dichotomy arose when Dr. Dunnette sought to describe the difference between the term "validity" and the term "job related" as applied to the tests at issue. It is perfectly plain that though the two concepts may overlap, they are not in all respects the same. The distinction, as given by Dr. Dunnette, tended to become confusing, as in the following testimony:

> Q. (Mr. Houghton) Earlier . . . you were asked to [compare] the term validity and job related. And then you said that job related was a broader term. . . . How is job related different than the way you've been using validity?
>
> A. I think some things can be said to be job related though not necessarily be shown to be job related in a statistical study. An obvious example I guess, would be that—I think medical school education would be related to the job of being a physician, but I'm not sure that I would talk about medical school education being valid, necessarily, to be a physician. It's just, you know, necessary. So I think that job related term can be broad in that it connotes a number of other kinds of prerequisites.
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> • • •
>
> A. As I've been using the term validity it is one important part of job related.
>
> Q. Okay, so it's a part of, although not quite as broad as job related?
>
> A. Yes.

Both Dr. Roskind and Dr. Dunnette agreed that if different questions were used, or different tests were given, than those selected by Respondent in the first instance, different results would be expected. In such case, it is said the tests would have to be revalidated.

It is also of some significance, in assessing Respondent's contention that the actual tests are not needed in order to determine whether the tests are discriminatory in their application, that the Department of Justice, in processing the civil rights suit against Respondent also insisted on seeing the actual tests given and actual scores made on the tests. According to Dr. Roskind, the tests were finally submitted to "their industrial psychologist [w]ith a stipulation that he would protect their confidentiality." Respondent also submitted test scores of those employees who signed releases.

(2) The contention that employees making low scores might be embarrassed and harassed is based upon speculation from certain vague hearsay testimony given by Dr. Roskind. It is admitted that the employees would be aware, before the arbitration, which applicants had made a score less than 10.3, and after the arbitration, those who made less than 9.3.

(3) Respondent's counsel also indicated at the hearing in this matter that, in order "to appease the Union in this case," Respondent "would be willing to disclose the tests to a qualified industrial psychologist . . . for a determination on behalf of the Union." Indeed, counsel stated Respondent "has offered" to do this. However, I am not aware of any evidence showing that such offer was made and it is not referred to among the 50 requested findings of fact in Respondent's brief. Indeed, the tenor of Respondent's responses to the Union's requests, as set forth in counsel's letter dated July 10, 1973, was that the Union's psychologists would not need to see the tests.[17]

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[17] On the other hand, Lewis, the Union's representative, testified at the hearing that "turning [materials] over to a professional psychologist doesn't sit well with us. We think the people on the firing line ought to understand the criteria put forward for promotion. It shouldn't be sent to some professional psychologist. Why shouldn't the [Union] chairman of each plant understand the criteria for promotion? This is our problem."

(4) At the hearing, though not stressed in the brief, Respondent took the position that it would give a detailed analysis of any employee's performance on the tests to the employee, but would not do this for the Union unless the individual authorized it.

Subsequent negotiations. The issues with which we are concerned here arose under the collective-bargaining agreement which expired on June 12, 1972. It is Respondent's contention that in the bargaining for a succeeding contract in 1972, the Union sought provisions which would give the Union access to psychological tests in the future, but that a new contract was agreed without any change in the provisions involved here, upon the Respondent's commitment to discuss these matters with the Union thereafter. I am not satisfied that the evidence in the record justifies the findings sought by Respondent on this point. The matter was first brought up by Respondent upon redirect examination of its last witness, Dr. Roskind, who admitted to only hearsay knowledge of the situation. Counsel also referred to testimony in the transcript of the arbitration hearing on the point. However, General Counsel was not a party to that proceeding, and had no opportunity to cross-examine witnesses with first-hand knowledge of the facts in that proceeding, or properly develop the matter. Indeed, it is far from clear what point Respondent is seeking to make. Counsel agreed at the hearing that "certainly it can't constitute waiver" of the Union's legal rights. Although Respondent requested findings of fact on the point, it made no argument in its brief that the facts had any bearing on the resolution of the issues in this case. In the circumstances, further discussion of this point does not seem warranted.

H. Analysis and Conclusions

It is here contended that Respondent violated the Act when it refused to disclose to the Union 1) the psycho-

logical tests administered to employee applicants for promotion to certain jobs in the bargaining unit represented by the Union, and 2) the scores made on the tests by the specific applicants, where Respondent disqualified certain of the employees for promotion solely on the scores made on those tests. The Union sought the information for the purpose of processing the grievances of employees thus rejected by Respondent for promotion. While the Union's asserted right to this information was under consideration by the General Counsel upon the charges filed in this case, the merits of the grievances were arbitrated under the provisions of the bargaining agreement between the Union and Respondent. The parties had stipulated that, notwithstanding the pendency of this case, the matter should proceed to arbitration, and that should it be held finally as a result of this proceeding that the Union should be given the materials which it sought, contrary to a decision by the arbitrator, the arbitration proceeding might be reopened to consider any union argument based on this information. Inasmuch as the parties have agreed that the arbitrator's decision on this point should not be final, it is necessary to determine whether Respondent violated the Act by refusing to submit the information requested.

It is well established that a labor organization which is obligated under the Act to represent employees in a bargaining unit with respect to the terms and conditions of their employment is entitled, by operation of the statute, upon appropriate request, to such information as may be relevant to the proper performance of that obligation. See *Curtiss-Wright Corporation* v. *N.L.R.B.*, 347 F.2d 61 (C.A. 3); *Stahl Specialty Company*, 175 NLRB 129; *Cowles Communications, Inc.*, 172 NLRB 1909; see also *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, where the Supreme Court held, at p. 437, that in requiring an employer to furnish information to the Union for the purpose of processing a grievance to arbitration, the Board acts "only upon *the*

probability that the desired information is relevant, and *that it would be of use* to the Union in carrying out its statutory duties and responsibilities." (Emphasis added.)

1. *Relevance of the information sought*

Respondent, at the outset, contends that the complaint should be dismissed because the Union has not shown a need for the information which Respondent has refused to give the Union. I find this argument to be without merit. The Union is entitled to data which is "reasonably necessary to [its] role as bargaining agent in the administration of [the] collective-bargaining agreement;" "wage and related *information* pertaining to employees in the bargaining unit is *presumptively* relevant, for, as such data concerns the more of the employer-employee relationship, a union is not required to show the precise relevance of it unless effective employer rebuttal comes forth." See *Curtiss-Wright Corp.* v. *N.L.R.B., supra,* at 68, 69. See also *Cowles, supra,* at 1909. As the Court in *Curtiss-Wright* further stated: "Reasonable necessity for the union to have relevant data is apparent; necessity is not a separate and unique guideline, but is directly related to the relevance of the requested data" 347 F.2d at 69.[18]

The information here sought concerns criteria unilaterally adopted by Respondent and used to determine which employees should be given an opportunity for, or be selected for promotion. Criteria for promotion constitute a significant element in an employee's working conditions, for they determine whether the employee will be advanced in position, obtain better working conditions, and qualify for higher wages. They are, therefore, clearly wage related and go to the core of the employer-employee relationship.

[18] In *Acme Industrial, supra,* where information was sought to assist a union in processing grievances, the Supreme Court noted that a liberal standard of relevance should be applied, 385 U.S. at 437. The cases cited by Respondent are not to the contrary.

Such criteria are mandatory subjects of bargaining, see i.e. *Clifton Precision Products etc.,* 156 NLRB 555; *Houston Chapter, Associated General Contractors,* 143 NLRB 409, and, in fact, standards for promotion were treated in the bargaining agreement in effect at the time the grievances in this matter arose. In the circumstances, therefore, I find that the information sought by the Union in this case was presumptively relevant. It is necessary therefore, to consider Respondent's evidence in asserted rebuttal of this presumption.

Respondent strongly asserts that access to the test questions would be of no assistance in determining the validity of the tests given, but that statistical and related data which are available to the Union are sufficient to prove the validity of the psychological tests for the purpose used. Therefore the Union does not need the tests. The claim, however, stretches this concept of statistical validity too far. The statistics may, indeed, tend to show that the tests are valid to serve *the employer's purpose*: i.e., they may serve to identify those employees likely to do well on the job. See *Psychological Testing and Industrial Relations,* Hagglund and Thompson Eds. (Center for Labor and Management, College of Bus. Adm., Univ. of Iowa, Monograph, 1969) Ch. I.[19] However, the statistics do not serve to inform the employees, or their representative, whether the tests are truly job related or contain objectionable distortions (it is admitted that "valid" and "job related" are not coextensive), whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut Respondent's contract commitment to promote by seniority where there is no "significant difference" between the "reasonable qualifications and abilities" of the applicants for promotion.

[19] It is noted, however, that an earlier set of tests, apparently statistically validated in the same way as the present battery, did not, in fact, work out as the employer expected.

In collective bargaining generally there is a normal conflict between the usual employer position that only the most competent employees should be considered for promotion and the usual union contention that promotion should be granted on the basis of seniority. See *Psychological Testing and Industrial Relations, supra,* Ch. II. A common compromise, as in this case, provides that seniority shall govern where abilities and qualifications are approximately equal. It is obvious that Respondent's testing procedure—which is designed to eliminate all but the more, at most, competent (or potentially the most competent)—appears to have a tendency to distort the contractually agreed upon standards. I shall consider the arbitrator's comments on this point hereinafter.

Since the Union was given no opportunity to see the tests or the questions or participate when the battery of tests was selected, or when they were administered, or at any time thereafter, the Union has been deprived of any occasion to check the tests for built-in-bias, or discriminatory tendency, or any opportunity to argue that the tests or the test questions are not well suited to protect the employees' rights, or to check the accuracy of the scoring. In short, however much the statistical data may prove that the tests are valid for the employer's purpose, there is no evidence that the statistics are valid to inform the employees of the criteria required for promotion, or to afford the Union the data required to protect the employee's rights under the statute and the contract. Indeed, if Respondent's total position in this case were sustained, employers using psychological testing—which is a fast growing device for personnel placement—may be enabled, by unilateral action, to freeze the employees' bargaining agents out of significant parts—perhaps most—of the promotional process.

I deem it quite significant that, although Respondent's independent expert, Dr. Dunnette, originally testified that

the Union had no need to know the content of the tests because the statistical data showed the tests to be valid, when it was suggested that the employees' right to know the criteria governing their working conditions involved a totally different concept, Dr. Dunnette stated he had not thought of that and shifted his position—concluding that the basic, or major reason the Union should not be given the tests or the test questions was their asserted confidential nature. This issue will be considered hereinafter.

It is also worthy of note that when the Department of Justice was investigating the alleged discriminatory nature of Respondent's psychological testing under the Civil Rights Act, the Department was not satisfied with the statistics allegedly showing that the tests were valid, but insisted upon the tests, themselves, which Respondent supplied to the Department's own psychologist.

Respondent also for reasons of asserted confidentiality which are considered later in this decision, has refused to give the Union the test scores made by the specified applicants for promotion in this matter. Contrary to Respondent's contention, the arbitrator, who passed on the merits of the grievances, stated, during the reopened hearing, after his initial decision, that, in his opinion, the Union could not adequately "police" the contract without this information. The arbitrator, in fact, directed Respondent to reconsider its selection process, in part, based upon the scores received by the applicants.

For the reasons stated I find that the record establishes a "probability that the desired information is relevant and that it would be of use to the Union in carrying out its statutory duties and responsibilities." See *Acme Industrial, supra.* As previously noted, the Union and Respondent agreed, in effect, that the Board should not defer to the arbitrator's opinion on this issue. I have nevertheless given it careful consideration.

It is important to note, however, that I am not required, nor do I find that the information sought would be found determinative or significant, in fact, by an arbitrator passing on the merits of the grievances. I am required only to consider whether the information sought has "potential value" for the purposes for which it is sought, see *Curtiss-Wright, supra,* at p. 70. The Union is not required to play "a game of blind man's bluff" in determining whether and how to process the employees' grievances. See *Acme Industrial, supra,* at 438-439. None of us know whether the contents of the tests will, in fact, assist the Union.[20] Indeed, the arbitrator stated only that he did "not believe that the Union's position was damaged by lack of access to the test." However, in the peculiar circumstances before him, he appears to have had little other choice. Thus once the arbitrator determined he had no authority to order Respondent to disclose the information which Respondent refused to give the Union, the arbitrator had to hold that he could proceed without the information, or he would have been unable to come to a complete decision on the issues. In fact, the arbitrator was aware at the time that the parties had agreed that he could leave the issue to be determined in this proceeding *de novo,* as I have done.

It may be further noted, to the extent that the arbitrator's opinion of the significance of the tests to the Union's purpose was based upon his belief that the tests were conclusive for all purposes because they were statistically valid for the Respondent's purpose, or was based upon Respondent's claim that the tests were an entrance requirement—like the physical requirement that the employee applicant have two hands and feet—rather than a method of ascertaining the "qualifications and abilities of the

[20] As the Board said in *Cowles, supra* quoting from a leading court decision, "it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issues." 172 NLRB at 1909.

employees" for promotion (see Art. VII, Sec. 13 of the bargaining contract), the record before me undercuts those conclusions. I have previously discussed the first of these arguments. As to the second, there can be no question, in my mind, that the tests, and the scores made on the tests, are designed to and they do test the "qualifications and abilities" of the employees for the jobs they bid on. It is true that this done in a novel way. Traditionally industry has looked to the employee's past experience to determine what he knew and what he could do. This new method determines what the employee knows and can be expected to do by means of written tests. The fact that they may not test job knowledge, as Respondent claims, does not change this. The bargaining contract speaks only of "qualifications and abilities" for promotion in a very broad sense. The tests given by Respondent do measure the qualifications and abilities of the employee applicants for promotion. The testimony of at least three witnesses for Respondent before the arbitrator confirmed this. This evidence, inconsistent with the arbitrator's opinion, was alluded to by the arbitrator only in passing. Again, as previously noted, if his decision were otherwise, the arbitrator would have been stymied by Respondent's refusal to disclose the tests. (If he found the tests were an element in qualifying the employees for promotion, it is difficult to see how the arbitrator could say the Union did not need them.) These remarks are not intended to be critical of the arbitration decision. Labor Arbitration is a pragmatic procedure designed essentially to resolve disputes, not to determine legal rights under the statute. The decision in that case is an excellent example of the process. These matters are raised to indicate that the content of the tests, in fact, do have a potential to affect the employees' rights under the contract. The parties have agreed that if Respondent is ordered to disclose the tests, the arbitrator may still hear arguments to that effect. The arbitrator has concurred.

2. *Confidentiality of the information*

Respondent asserts that it should not be required to disclose the tests to laymen who are likely to disclose them to potential job applicants, because this would destroy the validity of the tests and violate the code of the American Psychological Association. There is inherent in this position the contention that establishment of a new battery of tests on each occasion when jobs are bid would be costly and difficult. Respondent also contends that it should not be required to disclose the scores made by specific applicants on the battery of tests here under consideration because Respondent promised the applicants that the scores would be kept confidential, because the code of the American Psychological Association requires that they be kept confidential, and because Respondent fears that employees may suffer embarrassment if other employees know the scores made by the applicants (Respondent asserts a concern that the applicants would be harassed). Respondent does say that it is the Company's practice to discuss with the *individual applicant*, in detail, how the applicant did on the tests, upon the applicant's request. Respondent is also willing, it says, to submit the battery of tests to a qualified psychologist on the Union's behalf and to release any individual's score to the Union if the Union will obtain the employee's written release.

In essence, Respondent here contends that, having voluntarily chosen a particular form or mechanism to determine the right of bargaining unit employees to be promoted, Respondent is now precluded by the very devices which it adopted from dealing with the employees' bargaining representative about critical elements of the promotion process, and will deal only with the individual. Such a program, which freezes out the bargaining representative from participation in significant elements of the promotion process, and seeks to substitute individual bargaining therefor constitutes a complete negation of the bargaining process and

the rights of employees guaranteed by the Act. See *N.L.R.B.* v. *Medo Photo Supply,* 321 U.S. 678. Those Board and Court cases which have dealt with similar claims of confidentality as a basis for refusing to disclose relevant information, have rather consistently rejected the asserted defense. See i.e., *General Electric Co.* v. *N.L.R.B.,* 466 F.2d 1177 (C.A. 6) (the company had promised other companies to keep wage data confidential); *Curtiss-Wright Corp.* v. *N.L.R.B., supra,* (job evaluation and wage data of nonunit administrative and confidential employees); *N.L.R.B.* v. *Frontier Homes Corp.,* 371 F.2d 974 (C.A. 8) (asserted confidential selling price lists); *Cowles Communications Inc., supra* (company unwilling to link salaries to specific employees because this might offend employee "sensitivities"); *The Electric Auto-Lite Company,* 89 NLRB 1192 (company claimed it could not release wage data because employees had not authorized release); cf. *United Aircraft Corp.,* 192 NLRB No. 92 (company not required to disclose employees' physical incapacities discovered by company physician, in the absence of relevance "to some particular problem").

Respondent has produced no probative evidence that the employees' sensitivities are likely to be abused by disclosure of the scores.[21] To the extent that odium may be attached to employee applicants who did not pass the tests that is a natural consequence of Respondent's program.

I am not impressed with the argument that we should defer here to an asserted code of conduct of a psychological association. This is not a code of confidentiality which has received sanction in this area of the law so far as I am advised. In any event Respondent is not bound by the code, nor may the code insulate Respondent from the obligations imposed by the Act as a result of Respondent's own voluntary course of conduct. Cf. *United Aircraft Corp., supra.*

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[21] *Shell Oil Co.* v. *N.L.R.B.,* 457 F.2d 615 (C.A. 9), cited by Respondent, is completely distinguishable.

I am persuaded, however, as was the arbitrator, that mere disclosure of the tests to lay Union representatives is not likely to be productive of constructive results. If the tests are to be properly analyzed, this should be done by those who have the expertise to deal with the concept involved. The Union's lay representative in this case, who impressed me as a very able and intelligent man for the purpose, admittedly does not have such expertise. I am sympathetic with the frustration which he expressed in this case that the employees and their shop representatives should be able to handle their own shop problems if properly informed. Nevertheless, in some cases, as this, the technology of the efficiency experts may outrun the ability of the individual to cope. The individual then needs an expert of his own. However, this does not affect the right of the employee, through his representative, to be informed, but may determine the manner or form which the information is submitted. This will be considered hereinafter.

On the basis of the above, and the entire record in this matter, I find that Respondent, by refusing to submit to the Union upon request the battery of tests administered to and the actual test papers used by the employee applicants for the position of Instrument Man B involved in this case, and the test scores of the individual applicants made on the tests, violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit set forth in footnote 3 above is appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material to this proceeding, the Union was, and continues to be, the exclusive representative of the employees in the appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to honor the Union's demand for certain information relevant and reasonably necessary to the processing of employee grievances.

6. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent has violated the Act by failing and refusing to supply the Union with certain information, it will be recommended that Respondent cease and desist therefrom and supply the Union, upon request, with the information. However, for reasons previously stated, it is found that the purposes of the Act will best be effectuated if Respondent be directed to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf in this matter, such submission to be made within 10 days after Respondent receives notification of the individual selected. The psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them, for the purpose of disclosing

the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to Respondent. See *Fawcett Printing Corp.*, 201 NLRB 964.

It is also recommended that Respondent be directed to supply the Union with the scores made on the test battery by specific employee applicants for the position. I find without merit Respondent's contention that the scores made by the individual employees should not be released to the Union unless the Union secures the consent of the individuals concerned. The situation which obtains here was created by Respondent for its own advantage. The Union's obligation is to represent the unit of employees as a whole. Respondent may not frustrate this by requiring the Union to secure the consent of individuals in the unit in order to secure information relevant and reasonably necessary to the enforcement of the collective-bargaining agreement which exists for the benefit of all.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

[22] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Order

Respondent, The Detroit Edison Company, its officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with local 223, Utility Workers Union of America, AFL-CIO (herein "the Union"), by refusing to furnish the Union with information relevant and reasonably necessary to the processing of the grievances filed on behalf of employees represented by the Union pursuant to Section 9(a) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Within 10 days after notification by the Union of its selection of a qualified psychologist, submit to the individual selected by the Union copies of the battery of tests administered to employee applicants for the position of Instrument Man B at the Monroe Power Plant in November or December, 1971, or January 1972, including the actual test papers of the applicants, in accordance with the provisions of the section entitled "The Remedy" set forth above.

(b) Submit to the Union the actual test scores made by each specific named employee to whom the battery of tests was administered as set forth in paragraph 2(a) of this order.

(c) Post at its Monroe Power Plant copies of the attached notice marked "Appendix."[23] Copies of said

[23] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDG-

notice, on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

SIDNEY J. BARBAN
Sidney J. Barban
Administrative Law Judge

MENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL, upon request, furnish Local 223, Utility Workers Union of America, AFL-CIO, with information concerning the battery of tests given to applicants for the position of Instrument Man B, and the scores made by the applicants on the tests, which is relevant and reasonably necessary to the processing of the grievance filed on January 20, 1972, on behalf of applicants who were rejected for promotion to that position.

WE WILL NOT refuse to bargain collectively with that Union by refusing to furnish the Union with such information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

THE DETROIT EDISON COMPANY
(Employer)

Dated ———— By ————————————
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building 1249 Washington Blvd., Detroit, Mich 48226 Telephone No. (313) 226-3200.

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Case: 5430 0720 72

Grievance: PMO-123

IN THE MATTER OF ARBITRATION BETWEEN

LOCAL 223, UTILITY WORKERS UNION

—and—

THE DETROIT EDISON COMPANY, DETROIT, MICHIGAN

Preliminary Statement

This arbitration proceeding has been conducted pursuant to Article V of the parties' Collective Bargaining Agreement, dated July 3, 1972, and under the rules of the American Arbitration Association. The undersigned, Dallas L. Jones, was selected by the parties to serve as the impartial arbitrator. In accordance with Article V, Mr. Douglas McIlroy and Mr. R. W. Schleicher served, respectively, as Union and Company advisors to the Arbitrator.

The hearings were held in Detroit, Michigan, on May 23, May 24, May 30, and May 31, 1973. Both parties were present at the hearings and were given full opportunity to present their testimonial and documentary evidence and to cross-examine witnesses. A verbatim transcript (690 pages) of the proceedings was made. Mr. Clement J. Lewis, Director of Services, UWUA, appeared for Local 223. Mr. Ralph H. Houghton, Attorney, appeared for the Company. Both parties submitted post-hearing briefs.

Opinion

ISSUE:

The basic issue in this arbitration is whether the Company can establish as a qualification for entry into the

Instrument Man B classification the attainment of a minimum score on a test battery designed to determine the aptitudes necessary to successfully carry out the duties of the classification.

The contractual provisions directly applicable to this dispute are:

Article VII, Section 13. Promotions

In promotion of employees covered by this Agreement to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employes being considered are not significantly different. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences. If the Management proposes to by-pass any employee with greater seniority, the Management will discuss the matter with the chairman of the bargaining unit involved (at least five (5) days before the by-pass is made effective) in an attempt to reach an agreement thereon before such a by-pass is made. In the event of disagreement, the matter may be processed through the grievance procedure to the President of the Company, or his delegate, whose decision shall be controlling, except that the question of whether the by-pass has been arbitrary or discriminatory may be submitted to arbitration in accordance with Article V of this Agreement. If the arbitrator finds the by-pass was arbitrary or discriminatory, the by-pass will be canceled.

• • •

Article VIII, Section 38. Posting Notices of Vacancies

a. If a vacancy occurs in any one of the bargaining units covered by this Agreement and such vacancy is not filled by promotion or transfer with the group, a

notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs and a copy sent to a Union divisional officer designated by the respective division.

b. If such a vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department for a period of five (5) days. If the reasonable qualifications and abilities of the employees being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences.

• • •

BACKGROUND:

The Instrument Man B classification is an automatic progression type classification. That is, an individual enters the classification at labor grade T-3 and at six month intervals progresses through the Instrument Man B classification, assuming satisfactory performance, to the Instrument Man A classification. This requires four years. He enters the Instrument Man A classification at labor grade T-12 and in two years progresses to the top of the classification, T-16.

The general duties of the Instrument Man B classification,[1] as set forth in the job description for this classification, are:

> Under indirect and intermittent supervision of the Instrument Foreman, installs, calibrates, tests, adjusts, repairs, modifies, replaces, checks and lubricates a variety of different types of control, alarm, indicating

[1] One job description, the Instrument Man A, is used for both classifications.

> and recording equipment. Performs maintenance on electronic equipment as required. Corrects instrument failure. Builds test equipment. Records calibration data. Works from blueprints, diagrams, drawings. Is a guide for visitors. Assists vendor representatives.

The Instrument Man classification is thus responsible for the instrumentation in a power plant.

The Company has an industrial psychology group. The record indicates that in 1958-1959, this group validated and placed into use a standardized aptitude test battery for determining the capacity of employees to develop the skills necessary to perform the duties of the Instrument Man classification. This battery consisted of three tests: the Wonderlic Personnel Test, the Minnesota Form Board Test and certain portions of the Engineering and Physical Science Aptitude Test (EPSAT). In providing supervision with the results of this test, a three-tiered scoring system was used: "not recommended," "acceptable," and "recommended;" the supervisor does not receive the numerical score attained by the individual. Employees were required to take this test before acceptance into the classification.

This test battery was used until late 1969 or early 1970. The record does not indicate how many employees, if any, who took the test failed to get an "acceptable" score. Only one grievance involving the use of the test in denying an employee a promotion was cited, PC-527 and PC-529. In this instance, a senior employee who had received an "acceptable" score was bypassed by a junior employee who had received a "recommended" score. This grievance was upheld.

Sometime prior to 1969, the technical engineers in the power plants responsible for the instrumentation complained that the test battery was not clearly distinguishing between those individuals who could perform the job suc-

cessfully and those who could not. These complaints led to a re-validation study of the test battery. As a result of this study, the Wonderlic Personnel Test was dropped from the test battery. The three-tiered scoring system was discarded and a two-tiered system was substituted: "not recommended" and "acceptable." The "cutting" score, or "cut-off" score, was set at 10.3; that is, those receiving 10.2 and lower would be placed in the "not recommended" category and those above in the "acceptable" category. The 10.3 cut-off score included a portion of the former "acceptable" range but most of it became a part of the "not recommended" category.

The instant dispute arose at the Monroe Power Plant. This is one of the newer plants in the Detroit Edison system. In November 1970, one unit of the contemplated four units was in use, and a second unit was scheduled to go on the line in a few months. The Company asserts that because it is a new plant, it contains more sophisticated equipment than the older plants. Thus, claims the Company, while the job of the Instrument Man is the same as in other plants, he is required to use more frequently his higher level skills at the Monroe Plant.

In early November 1971, Mr. Fred J. Locke, Technical Engineer in charge of the instrumentation at the Monroe Power Plant, directed that six vacancies for the Instrument Man B classification be posted. However, instead of posting it in conformance with Article VIII, Section 38(a), it was posted in all of the bargaining units of the Production Department. When this error was called to Mr. Locke's attention by Mr. Roger Sprayberry, Monroe Bargaining Unit Chairman, Locke proposed that all the bids received be held unopened until the time for the bidding had expired, those bids received from other units be segregated from those received from the Monroe Plant, and the bids received from other units remain unopened until a determination had been made in regard to those bids received from Monroe. Mr. Sprayberry agreed to this procedure.

The Notice of Vacancy (or bid posting) listed four qualifications for the position: (1) successful completion of two years of high school mathematics and one year of high school science; (2) the successful passing of a physical examination if such an examination were deemed necessary; (3) a minimum score of "recommended" on the Instrument Man aptitude test; and (4) a satisfactory attendance record. Although the Notice of Vacancy listed a score of "recommended," the Company asserts that this was an error and the term "acceptable" should have been used in accordance with the two-tier system which had been placed in effect.

Ten employees of the Monroe plant submitted bids. Only one of these employees, A. Wiley, had taken the test previously; he had received a score of "acceptable" on the former test battery using the three-tier system. Arrangements were made for these men, except Wiley, to take the test. Seven of the nine appeared at the appointed time and took the test. All seven received a score of "not recommended." When it was learned that the score Wiley had received was the equivalent of a "not recommended," he was permitted to take the test again; he received a score of "not recommended." Because none of the Monroe bidders received a score of "acceptable," their bids were rejected.

Mr. Locke then turned to the more than thirty bids he had received from other units. Two of these bids were from employees who were incumbents; even though they had not taken the revised test and received a score of "acceptable" on it, they were granted transfer rights as incumbents. One of these employees later withdrew his bid leaving five openings to be filled.

Inasmuch as none of the employees from the other units had taken the test, another testing session was arranged. Of those who took the test, seven received a score of "ac-

ceptable." Mr. Locke then investigated the other qualifications of these seven employees and did not find a "significant difference" between the qualifications of the senior employees and the junior employees; therefore, the five employees with the most seniority were selected to fill the vacancies.

The instant grievance was submitted on January 20, 1972. It was denied at the third step on August 29, 1972 and thereafter timely submitted to arbitration.

Prior to the arbitration hearing, the Union asked the Company to provide certain information including a copy of the test. The Company responded by inviting the Union to attend a meeting at which a member of the Company's industrial psychology section discussed various aspects of the test; however, the Company refused to provide a copy of the test. Thereafter, the Union filed a Section 8A(5) charge with the National Labor Relations Board.

At the outset of the hearing, the Union served upon the Arbitrator a formal request to require the Company to furnish the Union a copy of the test. The Company refused to do so on the grounds that to furnish the Union a copy of the test would destroy its future usefulness, it would be in violation of the code of ethics of the American Psychological Association and the conditions under which the tests can be used, and it was not necessary to have copies of the actual test battery to determine its validity and reliability. The Company did furnish, however, sample questions which, while not identical to the actual questions used, were similar. The Company also provided test scores without identifying the individuals.

Following the oral proceedings, the Union, on June 26, 1973, renewed its request for a copy of the test as well as information concerning the scoring. On July 10, 1973, the Company again refused to furnish a copy of the test but did provide the requested information in regard to the

battery weights and scoring. On July 23, 1973, the Arbitrator ruled that to the best of his knowledge he did not have the power to require the furnishing of this information; however, he invited the Union to produce case citations to the contrary. This was not done.

On August 6, 1973, the following letter, written by Mr. Houghton but signed by both Mr. Houghton and Mr. Lewis, was received by the Arbitrator:

> Mr. Lewis and I met in Detroit on July 27 in an effort to resolve certain questions regarding the filing of briefs and your proceeding to render a decision in this matter. Mr. Lewis has agreed that briefs will be filed on or before September 5, 1973, and also that you ought to proceed with a decision in the case both with respect to the disclosure issue, as well as the substantive issue involved in the grievance itself.
>
> Mr. Lewis expressed concern that if you go ahead and render a decision on the disclosure issue, that that will somehow affect his position before the National Labor Relations Board. I advised him that in my opinion with the present case pending before the Board, he need not be concerned about waiving any of his rights. If Mr. Lewis desires, he can always ask the NLRB to review your decision in order to determine whether or not it is consistent with the policies of the Act.
>
> Mr. Lewis' primary concern seems to be this: If you should render a decision in favor of the Company both with respect to the disclosure issue and the substantive issue in the grievance and then the NLRB or a court, as the case might be, should ultimately order the Company to disclose the actual tests themselves, then in that event Mr. Lewis desires to have the opportunity to reopen the arbitration case in order to review his position after he has had a chance to see the

actual tests. Within those limited circumstances; that is, if the Company ever in fact is ordered to disclose the tests and does in fact disclose the actual tests as a result of a final court order, then I would be agreeable to having the arbitrator listen to any additional argument or evidence based upon the disclosure of the tests which might affect his decision with respect to the substantive issue in the grievance. This signed letter will suffice for that purpose.

In view of the fact that ultimate disclosure through a court test would take several months or possibly years, it does not make sense to hold up the arbitration decision for that amount of time. I feel the record is complete in the case before you, and you ought to decide the issues and then let the chips fall where they may with respect to the National Labor Relations Board case. I believe Mr. Lewis is agreeable with this procedure and, if so, he will sign this letter and forward the original to your attention.

The hearing was declared closed on September 18, 1973. At the request of the Arbitrator, the time for submission of his decision was extended.

DISCUSSION:

No useful purpose would be served by setting forth in full the positions of the parties and the extensive arguments in support of those positions. It is sufficient to state that the Company's position is that it has the right to establish minimum, reasonable qualifications for a job, including the attainment of an acceptable score on a reliable and valid test, and that Article VII, Section 13 does not come into play until these qualifications are met. The Union's position is that the contractual mandate requires an examination of all relevant information to determine if an employee is "head and shoulders" above another em-

ployee and that an employee cannot be disqualified on the basis of one item.

At the hearing, the question was raised whether the Arbitrator's decision should be based solely upon the Agreement, or whether he should take into account the Civil Rights Act of 1964, even though racial discrimination is not at issue here, as it affects the use of tests. The Company took the former position. While the Union agreed that the Arbitrator's primary function is to interpret the Agreement, the Union also argued he could not ignore federal law. As noted by the Union, the trial in a suit against the Company and the Union under the Civil Rights Act had just been concluded and the forthcoming decision might well have an impact upon this arbitration. Since the hearing in this arbitration was concluded, a decision in the suit has been rendered. The Arbitrator has carefully reviewed this decision for its possible impact upon this dispute.

The Arbitrator has also reviewed the arbitration cases cited by the parties in support of their positions. He has also studied the entire Lockheed Study cited by the Union including the arbitration cases upon which the conclusions of that study were based. In addition, he has examined the arbitration cases which have been reported since 1968, the date the Lockheed Study was published, in order to be fully cognizant of arbitral reasoning in this area.

(1)

The Union claims that the Company's initial failure to post the bid properly tainted the entire procedure; that is, because Mr. Locke was aware he had a number of bids from other units, he failed to give proper consideration to the Monroe people. This assumes that he would have selected Monroe people even though they had not received an "acceptable" score on the test. There is no evidence to suggest that this would have been the case. Instead it is clear

from the testimony that Mr. Locke had determined prior to the posting that he would not consider an applicant unless he received a score of "accepted" on the test battery. Thus, it seems to the Arbitrator that even if the Notice of Vacancy had been posted properly, the result would have been the same. Moreover, even if the Union's allegation is true, the Union agreed to the procedure that was used.

Related to this argument is the one that Article VIII, Section 38(a) requires the Company to fill the vacancies from among those Monroe unit employees who entered a bid. According to the Union, the phrase " 'if such a vacancy is not filled by a member of the bargaining unit' means generally none have applied." Seemingly, the Union would make an exception if the job required, for example, a chauffeur's license and the bidder was unable to obtain one, but basically the Union's argument is that measurement of employees must be within the unit with a trial period to follow.

There is no doubt that Section 38(a) does give to employees within the bargaining unit preference for promotions—assuming the position has not been filled from within the group—over employees in other bargaining units. The Arbitrator does not believe, however, that Section 38(a) can be given the effect urged by the Union.

This argument goes to one of the basic issues involved in this dispute—does the Company have the right to establish minimum, reasonable qualifications for a job? The Arbitrator believes that the Company does have that right. While Article VII, Section 13 gives weight to seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different," it does not, on its face, preclude the establishment of reasonable qualifications to perform the job before the measurement of qualifications and abilities begins. Unless it can be shown that the Union has negotiated a restriction upon

the right of the Company to establish reasonable qualifications, the right of the Company to do so should not be restricted. The testimony adduced at the hearing indicates that the Company has resisted every attempt by the Union to restrict this right.

This holding does not mean, however, that the Company can by-pass employees in a unit who meet the minimum qualifications in the hope of obtaining better qualified employees in other units. It is only when none of the bidders meet the reasonable established qualifications for the job, that the Company can move to the next step of the procedure.

In terms of the above holding, it follows that there was no violation by the Company of Article VIII, Section 38, *if* none of the bidders from the Monroe plant possessed the basic qualifications. By the same token, if this is true, there was also no violation of Article VIII, Section 13 because the Company selected the senior of the qualified bidders from the other units. It is to this question which the Arbitrator now turns.

There is no doubt that the Company has established and maintained the right to use tests as a measure of an employee's qualifications—the Union concedes this point. The Union has, however, raised several questions not only in regard to the use of the test, but in regard to the test itself.

One of the questions raised is whether the Company discriminates by requiring tests for some groups of employees and not for others. As a general observation, the Arbitrator does not believe so. Whether a test will be developed for a particular classification depends in large part upon the training required and the importance of the job. This means that tests will be developed for some classifications before others, and quite likely, tests will not be used for still other groups. There is no question that the Instrument Man job is one of critical importance and requires long training.

While the Union cited instances where the use of tests appeared to be an "on-again, off-again" proposition for certain classifications, this does not mean that the Company has been guilty of discrimination by consistently requiring tests for the Instrument Man classification; there is no evidence as to why this may have occurred in other classifications. It seems to the Arbitrator that the important point is that for over ten years an aptitude test has been consistently required for entrance into the Instrument Man classification and all potential candidates have been required to take it. The only exception appears to be when the Company employs an Instrument Man A from the "outside." Obviously, there would be no point in giving him a test. He is supposed to be fully trained and whether this is true or not can be determined during the probationary period.

A great deal of the testimony and evidence was concerned with the test battery itself. The Union questioned the validity of the test by reference to the type of questions asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning of the face validity of the test. Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance. There would be justification in the Union's request if the test were measuring job knowledge.

In support of its argument for disclosure of the test, the United cited *Central Soya Company,* 41 LA 1031. Frankly, the Arbitrator believes this decision was in error if in fact the tests used were standardized aptitude tests of the type here in question. The Arbitrator believes a better precedent is *Wisconsin Electric Power,* 36 LA 4601. In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test.

The Arbitrator accepts, therefore, that the test is what the Company claims it to be—a reliable valid test with a

correlation coefficient of .72. There is also no question that it is a "fair test" in the sense that its administration and scoring have been standardized. But even so, this does not answer the question of whether the Company can set a cut-off score and then disqualify an individual from further consideration if he fails to attain it.

There is no doubt that as tests go, this particular test has a high degree of validity. The way in which it was developed and is used also overcomes many of the objections raised by arbitrators and industrial relations practitioners; that is, the test was developed especially for this job (job related), and it has been properly validated.[1] In addition, and very important, the instant test is not used to compare one employee against another in terms of scores attained. (This was an important aspect of the arbitrator's decision in *Central Soya Co.* as well as several other cases reviewed by the Arbitrator, which held that a test could not be the "sole" criterion in promotions.) This problem is eliminated by reporting scores in terms of "not recommended" and "accepted."[2] Moreover, arbitrators have been much more prone in permitting tests to be used for disqualifying employees than permitting them to be used as a criterion for promotion. Indeed, as the Lockheed Study noted, "While tests are not the sole tool for promotion, they are often the sole tool for disqualification."[3] This follows the generally accepted theory that tests are best used in placement decisions.

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[1] Lack of validation was the reason for Arbitrator Anderson's decision in a case cited by the Union, *Containers, Inc.,* 49 LA 589, along with the fact that it was an intelligence test.

[2] It might be noted that of the seven bidders who received "acceptable," the two who were not chosen had scores of 12.7 and 12.6. Three of the five who were selected had scores of 10.4.

[3] For a case expressing this viewpoint, see *Glass Containers Manufacturing Institute,* 47 LA 217.

Nevertheless, tests are not perfect predictors of success—and the Company does not claim otherwise—even when they have high validity as here; they simply increase the probability of successful performance if a certain score is attained. But even when that score is attained there will be people who will not succeed, and there will be people who would have succeeded even though their scores were below the cut-off point. This point is illustrated by the scatter diagram contained in the Company's Exhibit #11.

This diagram makes clear that individuals who score less than 9.2 (or 9.3) have virtually no chance of succeeding. It is also clear that by establishing the cut-off score of 10.3 the accuracy of the prediction is increased—13 of the 16 above average performers scored 10.3 or better while 13, and perhaps 14, of the 17 below average performers scored less than 10.3. But it also increases the number of people who are rejected, some of whom would have succeeded. Thus, between 9.3 and 10.3 there were three who were rated above average and six who were not.

If the cut-off score had been set from 9.0 to 9.3, the Arbitrator would have no difficulty in saying that if an individual did not attain that score he should receive no further consideration; one could then compare the cut-off score, as the Company has done, to having one hand or two, being color blind or not, etc. But that is not the case here. By setting the cut-off score at 10.3, the score which produces the best results in terms of predictability, it does more than eliminate only those who have no chance of succeeding.

The Arbitrator does not believe that the setting of the cut-off score at 10.3 is in itself arbitrary; this has been done for good reason as noted. But the Arbitrator is convinced that the manner in which the test score is applied does border on arbitrary action. There is no doubt—although there were some late protestations to the contrary—

that those individuals who did not attain an "acceptable" score were removed from any further consideration. This seemingly differs from testimony given by the Company in Court as well as testimony by the Company's psychologists concerning the proper use of tests. (See also the two paragraphs under the heading "Conclusions" on page 6 of Company Exhibit #11.) It also differs from the way in which the Company determines whether an employee meets the qualification of "satisfactory attendance;" in attendance cases, if an employee's attendance record is poor based upon certain norms, an investigation is conducted to determine the cause of that poor attendance. The statistics are not accepted at face value.

It seems to the Arbitrator that the same approach should be used here. Based upon the evidence, it is clear that an individual who scores 10.3 is far more likely to succeed than one who does not. It clearly indicates a significant difference between two such employees *unless* there is something in the individual's background which would offset this lower score. In fairness to the senior employee, there should be such an investigation; otherwise seniority is undermined.

The next question is whether any one was harmed by the Company's action. It is impossible for the Arbitrator to make this determination. While the Union argued that the grievants had qualifications which offset their test scores, the Arbitrator is not certain that this is true. Experience in certain work or educational activities may or may not be important; the evidence in this regard was not overwhelming. Certainly, such experience, work or educational, cannot offset scores of below 9.3. In fairness to those grievants who scored between 9.3 and 10.3, however, it seems to the Arbitrator that the parties should review their qualifications to see if they do have qualifications that were not fully considered and that would offset their failure to attain a 10.3 score.

(3)

The Arbitrator notes in conclusion that the impact of the Civil Rights suit upon this particular test is uncertain. To attempt to reach a conclusion based upon the evidence presented is not feasible. While the test appears to meet certain of the guidelines, it is not clear whether it meets others. It seems best, therefore, for the Arbitrator to defer judgment on this matter.

Award

For the reasons set forth above, the Arbitrator finds that the Company did not violate the Agreement by establishing the attainment of an "acceptable" score on the Instrument Man test battery as a general qualification for selection into the Instrument Man B classification. The attainment of such a score creates a presumption of "significant difference" over the failure to attain such a score, unless offset by relevant educational or job experience. The Company is obligated to consider such evidence and cannot disqualify an employee without such consideration. Certain of the grievants, as indicated hereinbefore, shall have their qualifications reviewed to determine if such qualifications offset their failure to attain an "acceptable" score. In the event it is found that any or all of these grievants have the qualifications necessary to offset the "not recommended" score they received on the aptitude test, they shall be promoted into the Instrument Man B classification.

DALLAS L. JONES
Dallas L. Jones
Arbitrator

Dated at: Ann Arbor ,Michigan
December 3, 1973

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Case: 5430 0720 72

Grievance: PMO-123

IN THE MATTER OF ARBITRATION BETWEEN LOCAL 223,
UTILITY WORKERS UNION

—and—

THE DETROIT EDISON COMPANY
DETROIT, MICHIGAN

Preliminary Statement

On December 3, 1973, the undersigned arbitrator, Dallas L. Jones, rendered an Award in the above captioned matter which reads:

> "For the reasons set forth above, the Arbitrator finds that the Company did not violate the Agreement by establishing the attainment of an 'acceptable' score on the Instrument Man test battery as a general qualification for selection into the Instrument Man B classification. The attainment of such a score creates a presumption of 'significant difference' over the failure to attain such a score, unless offset by relevant educational or job experience. The Company is obligated to consider such evidence and cannot disqualify an employee without such consideration. Certain of the grievants, as indicated hereinbefore, shall have their qualifications reviewed to determine if such qualifications offset their failure to attain an 'acceptable' score. In the event it is found that any or all of these grievants have the qualifications necessary to offset the 'not recommended' score they received on the aptitude test, they shall be promoted into the Instrument Man B classification."

Upon receipt of the Award, the Company proceeded to implement it. Subsequently, the Union questioned whether the Company had fully complied with the Award and requested the Arbitrator, through the American Arbitration Association, to reopen the hearing. The American Arbitration Association determined that the Arbitrator had not retained jurisdiction of the matter; therefore, he could not act without a joint stipulation from the parties. Subsequently, the parties entered into such a stipulation after reaching agreement upon the issue to be presented to the Arbitrator.

The hearing was held on July 18, 1974 in Detroit, Michigan. Mr. Douglas McIlroy and Mr. Raymond W. Schleicher served, respectively, as Union and Company advisors to the Arbitrator. A verbatum transcript of the proceedings was made. Mr. Clement J. Lewis, Director of Services, U.W.U.A., appeared for Local 223. Mr. Ralph H. Houghton, Attorney, Fischer, Franklin and Ford, appeared for the Company. Both parties submitted post-hearing briefs.

Opinion

The stipulated issue in this proceeding is:

> "Whether the Detroit Edison Company has properly implemented the Award in accordance with the opinion attached thereto."

BACKGROUND:

Upon receipt of the Arbitrator's Opinion and Award, the Company proceeded to implement it in the following manner. First, the Company reviewed the test scores of those employees at the Monroe Power Plant who had taken the test to identify which of them had scored between 9.3 and 10.3. Three employees had achieved such a score—Michael J. Pratt, Gary D. Longton, and Richard Burger. Mr. Frank E. Agosti, Assistant Superintendent and Equipment Engineer of the Monroe Power Plant, was given responsibility for interviewing these employees to determine if there was anything in their backgrounds which would indicate they had the ability to perform the work of the Instrument Man Classification and thus offset their failure to attain a 10.4 score on the test.

In order to standardize the interviews and to make certain, insofar as possible, that all relevant information was obtained, an interview guide was prepared by Mr. Agosti (Company Exhibit #1). He was assisted in this task by Mr. William L. Roskind, Company Psychologist, and Mr. Lawrence E. Kanous, Company Psychologist and Director of Training. The questions to be asked covered areas of educational achievement and work experience seemingly relevant to the job of Instrument Man (Company Exhibit #1). The interviewee was also permitted to indicate other experience which he believed important and which was not covered by the interviewer.

Mr. Agosti then interviewed each of the three employees. These interviews required from one-half to one hour and took place either in Mr. Agosti's office or on the job. Mr. Agosti took notes during the interview and each employee was permitted to review these notes to determine if they were accurate and complete. Following the interviews, each employee was also permitted to submit substantiating data and/or information in regard to his claims.

After the interviewing process had been completed, Mr. Agosti prepared for each employee a summary of the information obtained (Company Exhibits #2, #3, and #4). Because two of the employees had indicated extensive military training and experience, Mr. Agosti turned to Mr. Kanous for assistance in evaluating this training.[1] Mr.

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[1] Mr. Kanous' qualifications for undertaking this task are: He is a reserve officer (Major) in the United States Air Force assigned to the Training Research Branch of the Air Force Systems

Kanous advised Mr. Agosti that the training received by Mr. Pratt was substantially related to the job of the Instrument Man, whereas the training received by Mr. Longton was not. This advice was based upon a review of the content of the training programs as well as reference to the military comparability manual, which indicates the degree to which military occupations are related to civilian jobs (Company Exhibits #5 and #6).

Upon the basis of this information as well as upon other information which he had obtained, Mr. Agosti concluded that Mr. Pratt's qualifications were such as to offset his failure to obtain a 10.4 score on the test and he should be promoted to the Instrument Man B Classification. Mr. Agosti did not believe, however, that this was true of Mr. Longton and Mr. Burger; therefore, they were denied promotion. The Union immediately protested the Company's action.

DISCUSSION:

(1)

The issue in this dispute, as stipulated by the parties, is a narrow one: "Whether the Detroit Edison Company has properly implemented the Award in accordance with the opinion attached thereto." This stipulation also limits the Arbitrator's authority; his decision must be limited to determining whether the Company did properly implement the Award. The record should reflect, however, two matters raised by the Union at the outset of the hearing and which were a part of the original hearing.

The first matter has to do with the disclosure of the tests and test scores. If the Union prevails in its efforts to force

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Command. In this capacity he has been working with training programs for a long period of time. As the Company's Director of Training, he has had to familiarize himself with and evaluate training programs to assist returning veterans.

disclosure through an unfair labor practice charge against the Company, the Union then has the right to reopen the hearing if it so desires. The letter of agreement between the parties to this effect is set forth in full in the original decision.

The Company, for the purpose of the instant hearing, did disclose the names of those individuals at the Monroe Power Plant who scored between 9.3 and 10.3. The actual score received by each individual was not disclosed; however, this is not of such importance as to preclude a review of the Company's action in implementing the Award. Regardless of the score an individual attained in the range between 9.3 and 10.3, it is, under the terms of the Award, his qualifications other than test score which become of decisional importance.

While there was some confusion at the outset of the hearing as to how many employees at the Monroe Power Plant were entitled to the review ordered by the Arbitrator, this confusion was cleared away by the testimony of Mr. Roskind. The Union also intimated that the qualifications of other employees should have been reviewed, but there was no evidence introduced as to why this should have been done nor were such employees identified.

The second matter concerns whether the test will meet the standards established by the courts and the E.E.O.C. under Title VII of the Civil Rights Act of 1964. The Arbitrator did not attempt to make a conclusive determination of this issue in his Opinion but decided to "defer" it. In retrospect, it is clear that the Arbitrator should have provided more explanation for his decision; however, this explanation was set forth during a discussion at the hearing between the Arbitrator and representatives of the parties. If the test is found to be in violation of the guidelines, the Union will then have, as discussed at the hearing, a basis for further action. It should be noted, however, that the Arbitrator found that the Company had a contractual right

to utilize the test, and both parties agreed this was the Arbitrator's primary concern and responsibility.

(2)

While the Union has raised several objections to the manner in which the Company proceeded in carrying out the Arbitrator's directive as contained in the Award, it is the Arbitrator's belief that the Company's procedure was conceived and, for the most part, carried out in a manner consistent with the Award. This is so for the following reasons:

The Arbitrator's holding that the attainment of a 10.3 score created a "presumption of 'significant difference'" over the failure to attain such a score was based upon the evidence which clearly indicated that there was a very high probability that those who attained such a score could successfully perform the job, whereas this was not true for those who failed to do so. The "presumption" of significant difference arises from this fact; that is, the test separates, with a high degree of confidence, those individuals who have the aptitude necessary to perform the job from those who do not. Thus, when one individual attains a 10.3 score and another fails to do so, it can be tentatively said, under the terms of Article VII, Section 13, that there is a "significant difference" between the "reasonable qualifications" of the two individuals.

While the evidence was clear that an individual who scored below 9.3 had virtually no chance of meeting the demands of the Instrument Man Classification, this was not true for those who scored between 9.3 and 10.3. Although most individuals in this group will not succeed, there are some, if they can be identified, who will succeed if given the chance. The Arbitrator held, therefore, that those individuals who scored between 9.3 and 10.3 should not be rejected without further consideration; instead, their past work and educational experience should be reviewed to

determine if there was evidence to indicate they had the ability to perform the job and thus offset their failure to attain a 10.4 score.

In order to fulfill the Arbitrator's directive, the Company constructed an interview guide (in effect a focussed interview) designed to elicit work and educational experience relevant to the job requirements of the Instrument Man Classification. A review of the interview guide in terms of the requirements of the Instrument Man Classification, as set forth in the job description, results in the conclusion that this purpose was carried out. The areas covered in the interview guide are relevant to the job. While the Union has objected to the extensive probing that this procedure involved, the Comany was clearly under an obligation to obtain full information concerning each of the grievants. A less systematic and extensive approach would have left the Company open to the charge that it had not followed the directive contained in the Arbitrator's Award.

The Union argues next that the background of the grievants had to undergo an extensive investigation not required of those employees who attained a score of 10.3 and that the relevant experience of the grievants was equal to or better than that of many of those who were promoted. The Union also queries the Company's use of military experience in assessing an individual's qualifications.

It would appear that the Union has misconstrued the Arbitrator's Award and the reasoning that went into it. Again, the test very successfully identifies those people who have the *aptitudes* necessary for successful job performance. Irrespective of past work experience, there is a high probability that with proper training those who score 10.4 will develop the *abilities* necessary to successful job performance. A score between 9.3 and 10.3 creates a serious doubt as to whether an individual possesses the necessary aptitudes; if he lacks such aptitudes, he will not be success-

ful in the job regardless of the amount of training he receives.

This is so because training cannot overcome the lack of aptitudes; training can only develop the potential capacities or abilities which the individual possesses. While training should enable an individual to perform better than he could before such training, this does not mean the individual will be a successful performer unless he has the aptitudes to fully utilize such training.

Because a score on the test between 9.3 and 10.3 creates serious doubt that an individual has the necessary *aptitudes* for the job, the only way in which this doubt can be overcome is to examine his work experience and educational achievements to determine if he has the *ability* to perform the job; that is, has he actually displayed the abilities required of the Instrument Man? If such evidence is present, he has overcome the "presumption of a 'significant difference' " created by his failure to attain at least a 10.4 on the test. At this point, he is on a par with the individual who has attained a 10.4 score and other factors become relevant in determining who will be promoted.

The Arbitrator believes that anything in an individual's prior experience which can be helpful in determining whether he has the ability to perform the job should be used, including military experience. This was the clear intent of the Award. While the Arbitrator realizes that one individual may be more fortunate in the opportunities he has had, the Arbitrator does not know of any way to overcome this dilemma.

The final question is whether in reviewing the education and work experience of Mr. Burker and Mr. Longton, the Company acted in an arbitrary or discriminatory manner in failing to promote them. (The action in regard to Mr. Pratt is not at issue because he was promoted.) While the Company urges that the Arbitrator's role is a limited

Pratt is not at issue because he was promoted.) While the Company urges that the Arbitrator's role is a limited

one and he should not substitute his judgment for that of the Company, the Arbitrator does have a clear responsibility to review the qualifications of Mr. Burger and Mr. Longton in terms of the requirements of the job to determine if the Company acted in a logical and reasonable fashion. The Arbitrator takes notice of the fact that he does have some knowledge of the job requirements of the Instrument Man Classification acquired not only through this case but previous cases as well.

The Arbitrator cannot find in Mr. Burger's past experience evidence that he has the necessary abilities to perform the job; indeed, the Union came close to conceding that this was so. His college work in chemistry and algebra represent additional education, but while helpful, they are not essential for the job. More important is the fact that while such courses often, but not always, require the student to develop analytical ability, he was not able to utilize this training in terms of successfully passing the test.

It would seem that he has successfully performed the job of Power Plant Operator, but this does not mean, *per se*, that he can do the work of the Instrument Man Classification. In order to hold that successful performance on one job will lead to successful performance on another job, there must be a showing that the abilities required for one job have relevance to the other job. There is no such evidence here; indeed, the evidence there is indicates that there is little relationship between successful performance as a Power Plant Operator and successful performance as an Instrument Man.[1] The Arbitrator holds, therefore, that the Company's action in refusing to promote Mr. Burger was reasonable.

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[1] The testimony indicates that in the past many who were selected to become Instrument Men were from the Power Plant Operator Classification. Their inability to perform all the requirements of the Instrument Man Classification led to the action in strengthening the selection process.

The assessment of Mr. Longton's qualifications presents a more difficult task. While Mr. Pratt's background experience is clearly superior to that of Mr. Longton as the Company has noted, this is not of importance here. The important question is whether there is sufficient evidence to indicate that Mr. Longton has the ability to perform the Instrument Man job.[1]

It seems to the Arbitrator that there is some evidence that this may be so. While his military experience is not directly relevant to the Instrument Man job,[2] he did have to use some analytical ability and judgment in carrying out his duties. The unrefuted testimony indicates, however, that this analytical ability and judgment was confined to the use of various testing devices to determine if the cable or component was working properly; if not, the cable or component was replaced. While the Instrument Man classification includes work of this nature (see Typical Duty No. 4 of the Job Analysis) and uses some of the same testing devices, it is not the most important work of the classification such as trouble-shooting and repair of equipment.

Much the same can be said of his television repair work; the work which he performed can be termed routine in nature. Although such electronic experience, as well as his course in hydraulics, is experience and information necessary to the Instrument Man job, it does not provide a clear

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[1] A bothersome point in regard to Mr. Agosti's interview with Mr. Longton is that it was conducted on the job and subject to repeated interruption. There is no claim, however, that the information obtained was incomplete or inaccurate.

[2] While the Arbitrator does not question the validity of the comparability manual—he is aware that this was carefully prepared—the review of an individual's qualifications must include not only relevant work experience but must include as well an examination of any type of work experience to determine if the abilities sought were a part of that work experience.

indication that he has the necessary abilities to go beyond this point and carry out the more important functions of the classification. The skills and information possessed by Mr. Longton can be developed or obtained in a relatively short period of time.

The Arbitrator has no intent of denigrating the experience of Mr. Longton. He seemingly utilized the opportunities available to him. However, the problem is that while he may have the abilities necessary to perform all of the duties of the Instrument Man Classification, the evidence is not such as to indicate that he clearly has such abilities. The Arbitrator cannot hold, therefore, that the Company has acted unreasonably in failing to promote the grievant.

Award

The Detroit Edison Company has properly implemented the Award in accordance with the Opinion attached thereto.

DALLAS L. JONES
Dallas L. Jones
Arbitrator

Dated at: Ann Arbor, Michigan
October 22, 1974

EQUAL EMPLOYMENT OPPORTUNITY: EMPLOYMENT TESTING

Following is the text of EEOC's Guidelines on Employee Selection Procedures. The revised regulations, effective August 9, 1970, were republished on November 24, 1976 in response to the Guidelines issued on November 23, 1976 by the Labor Department, the Justice Department and the Civil Service Commission, Despite the new regulations, the EEOC guidelines remain applicable to all employers and others subject to the jurisdiction of EEOC.

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—GUIDELINES ON EMPLOYEE PROCEDURES

Republication of Guidelines

Sec.

AUTHORITY: The provisions of this Part 1607 issued under Sec. 713, 78 Stat. 265, 42 U.S.C. sec. 2000e-12.

§ 1607.1 STATEMENT OF PURPOSE.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "TEST" DEFINED.

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 DISCRIMINATION DEFINED.

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 EVIDENCE OF VALIDITY.

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance of the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: *Provided,* That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or contruct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been

developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) in assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available:

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the

test and a criterion of job success for the tests to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test of the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of

subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 Continued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a

specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall

not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership oportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being on the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.